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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 109

**CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS
PRESIDENT OF COMMITTEE OF YONKERS COM-
MUTERS, ETC., APPELLANTS,**

VS.

**THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND THE NEW YORK
CENTRAL RAILROAD COMPANY**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK**

FILED JUNE 19, 1943.

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[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

Civil Act File # —

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
(State Division, Department of Public Service), City of
Yonkers, and John W. Tooley, Jr., as President of Com-
mittee of Yonkers Commuters, a voluntary unincorpor-
ated association composed of more than seven members,
Plaintiffs,

against

**UNITED STATES OF AMERICA and The New York Central
RAILROAD COMPANY, Defendants**

COMPLAINT—Filed May 21, 1943

To the Honorable Judges of Said District Court:

The plaintiffs above named bring this action, pursuant to the provisions of the Urgent Deficiencies Appropriation Act, approved October 22, 1913 (38 Stat. L. 219, 220, Code of Laws of the United States, Title 28, Section 41 (28) 43-48 inclusive), and other applicable Statutes of the United States, permanently to enjoin, set aside, annul and suspend the order of the Interstate Commerce Commission dated March 20, 1943, as extended by an order dated April 19, 1943 in Finance Docket #13914, a proceeding in which each of the plaintiffs were parties.

By that order the Interstate Commerce Commission pur-
ported to permit the abandonment of the so-called Yonkers
Branch of The New York Central Railroad Company ex-
tending from Van Cortlandt Park Junction, New York
City, to Getty Square, Yonkers, a distance of approximately
3.1 miles, in Bronx and Westchester Counties, New York,
which said line is located in the Southern District of New
York and which said abandonment was to be effective on
May 29, 1943.

Plaintiffs aver that said orders of the Interstate Com-
merce Commission are arbitrary and capricious, not sup-
ported by substantial evidence, contrary to the evidence of

record in Finance Docket 13914, and were made without affording to the plaintiffs herein a fair and adequate hearing, and that in making same the Interstate Commerce Commission exceeded its statutory authority. In support thereof plaintiffs allege as follows:

[¶6l. 2] First. That the plaintiff Public Service Commission of the State of New York (State Division, Department of Public Service) is a Commission existing under the provisions of the Public Service Law of the State of New York and has jurisdiction over railroads, street railroads and interurban electric railroads operating within the State of New York, as provided in Articles 2 and 3 of the said Public Service Law of the State of New York.

Second. Plaintiff, City of Yonkers, is a municipal corporation created and existing under and by virtue of the laws of the State of New York, and has its office at City Hall in the City of Yonkers, County of Westchester, State of New York.

Third. Plaintiff, John W. Tooley, Jr., resides at 580 Van Cortlandt Park Avenue, Yonkers, N. Y. and is President of Committee of Yonkers Commuters, a voluntary unincorporated association composed of more than seven members suing on behalf of themselves and all others interested as commuters upon the Yonkers Branch, hereinafter described, who shall come in and contribute to the expenses of this suit; all of whom are residents of the territory served by said Yonkers Branch and are regular riders and commuters upon said Branch, who are persons aggrieved and injured by the aforesaid orders of the Interstate Commerce Commission.

Fourth. The United States of America is made a defendant in this suit pursuant to said acts of Congress hereinbefore named.

Fifth. Upon information and belief, the defendant, The New York Central Railroad Company, is a corporation duly created, organized and existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Illinois and Michigan. Said defendant has its principal office and place of business at 466 Lexington Ave. in the City of New York, where its general and executive officers are located and its general business in the State of New York is conducted and that said defendant is a resident of the Southern District of New York.

Sixth. That heretofore and on or about the 20th day of August, 1942 the defendant, The New York Central Railroad Company, filed an application with the Interstate Commerce Commission of the United States, in which it sought permission to abandon its so-called Yonkers Branch extending from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, approximately 3.1 miles, in Bronx and Westchester Counties, New York. A copy of said application is attached hereto and made a part hereof, and marked Exhibit A.

[fol. 3] Seventh. That the Interstate Commerce Commission held a public hearing upon said application at the City of Yonkers, New York, on the 12th day of November, 1942, at which the defendant, The New York Central Railroad Company, and the plaintiffs herein were represented by counsel. A copy of the transcript of the record of said hearing is made a part hereof by reference and marked Exhibit B and filed with the Clerk of the Court with this complaint.

Eighth. That on or about February 8, 1943 an examiner of the Interstate Commerce Commission who did not preside at the hearing and who was not present at the hearing, filed a proposed report with the Commission, a copy of which is annexed hereto and made a part hereof and marked Exhibit C.

Ninth. That subsequent to the filing of said examiner's report, the plaintiff, City of Yonkers, duly filed exceptions to said examiner's proposed report with the Interstate Commerce Commission. A copy of said exceptions is annexed hereto and made a part hereof and marked Exhibit D.

Tenth. That subsequent to the filing of said examiner's proposed report, plaintiff Committee of Yonkers Commuters, duly filed exceptions to said examiner's proposed report with the Interstate Commerce Commission. A copy of said exceptions is annexed hereto and made a part hereof and marked Exhibit E.

Eleventh. That subsequent to the filing of said examiner's proposed report plaintiff Public Service Commission of the State of New York (State Division, Department of Public Service), duly filed exceptions to said examiner's proposed report with the Interstate Commerce Commission. A copy

of said exceptions is annexed hereto and made a part hereof and marked Exhibit F.

[fol. 4] Twelfth: That on or about 21st day of February, 1943, defendant The New York Central Railroad Company filed a reply to said exceptions. A copy of said reply is attached hereto, made a part hereof and marked Exhibit G.

Thirteenth. That thereafter and on the 3rd day of March, 1942 oral argument in said proceeding was heard before Division 4 of the Interstate Commerce Commission. A copy of the transcript of the record of said oral argument before Division 4 is made a part hereof by reference and marked Exhibit H and will be filed with the Clerk of the Court with the Complaint in this Action.

Fourteenth. That thereafter and on the 20th day of March, 1943 said Division 4 filed its report upon said exceptions, a copy of which report is annexed hereto and made a part hereof and marked Exhibit I, and on said day said Division 4 issued its certificate and order permitting the abandonment of said Yonkers Branch. A copy of said order and certificate is annexed hereto and made a part hereof and marked Exhibit J.

Fifteenth. That thereafter and on or about the 16th day of April, 1943, the plaintiffs duly filed with the Interstate Commerce Commission petitions for a further hearing, rehearing, review, reconsideration and reargument of said order and decision, and for a vacation and stay of said order of Division 4. Copies of said petitions are annexed hereto and made a part hereof and marked Exhibits K, L and M.

Sixteenth. That on or about the 24th day of April, 1943, the defendant The New York Central Railroad Company and the City of New York filed replies to said application for rehearing or further hearing. Copies of said replies are annexed hereto, made a part hereof and marked Exhibits N and O respectively.

Seventeenth. That thereafter and on or about the 19th day of April, 1943, an order was entered by the Interstate Commerce Commission extending the effective date of its order permitting the abandonment of said Yonkers Branch to May 29, 1943. A copy of said order is annexed hereto and made a part hereof and marked Exhibit P.

Eighteenth. That on or about the 10th day of May, 1943, an order was entered by the Interstate Commerce Commission [Vol. 5] without opinion denying plaintiffs' application for a further hearing, rehearing, review, reconsideration, reargument, vacation or stay. A copy of said order is annexed hereto and made a part hereof and marked Exhibit Q.

Nineteenth. Upon information and belief, the so-called Yonkers branch of the New York Central Railroad Company is a part of a suburban or interurban electric railway running from Getty Square in the City of Yonkers, New York, to Sedgwick Avenue in the City of New York and said branch is not operated as a part or parts of a general steam railroad system of transportation and same is located wholly within the State of New York and is not operated in Interstate Commerce and said line carries no freight and its passenger traffic is carried solely between points located in the City of Yonkers and the City of New York.

Twentieth. Upon information and belief, by reasons of the facts alleged herein, the Interstate Commerce Commission was without jurisdiction or power to authorize or permit the abandonment of said so-called Yonkers branch of the New York Central Railroad Company and its aforesaid orders purporting to do so are null and void.

Twenty-first. Upon information and belief that plaintiffs were denied a fair and adequate hearing by the Interstate Commerce Commission in that said Interstate Commerce Commission finally determined the application of the defendant New York Central Railroad Company to abandon its so-called Yonkers branch without affording an opportunity to plaintiffs to present material and relevant evidence bearing upon said application and briefly described as follows:

(a) Evidence that the City of New York intends to extend the Broadway-Lenox Avenue subway from 145th Street to connect with the I. R. T. Lexington Avenue subway, 162nd Street, and to make the Sedgwick Avenue terminus of said electric railway sought to be abandoned a station upon said subway extension, thus restoring connections with a downtown New York line as they existed during the operation of the Sixth and Ninth Avenue elevated lines at a time when said so-called Yonkers branch was operated at

a profit, which said evidence was not reasonably discoverable at the time of said original hearing by the exercise of due diligence.

(b) Evidence that the City of Yonkers actually will reduce [fol. 6] the tax assessment on the right-of-way of said Yonkers branch within the City of Yonkers by the amount of \$224,000, so that the defendant, The New York Central Railroad Company's expenses for taxes used by Division 4 of the Commission in computing the loss sustained in the operation of said branch will be reduced by the sum of approximately \$9,000 per annum.

(c) Evidence that the earnings of defendant The New York Central Railroad Company have steadily increased since the period used by the Interstate Commerce Commission as the basis for its determination herein and that the earnings of said Yonkers Branch have also increased subsequent to the period used by the Interstate Commerce Commission as the basis for its determination herein.

(d) Evidence that the drastic curtailment by the United States Government of the use of gasoline and rubber for transportation purposes subsequent to November 12, 1942, when the hearing upon the application of the defendant railroad was held, has adversely affected and changed the situation with respect to the availability of substitute methods of travel for users of said Yonkers Branch, as previously found by the Interstate Commerce Commission.

(e) Other and further evidence more fully described in Exhibits K, L and M attached to this complaint.

Twenty-second. Upon information and belief, that the aforesaid orders and decisions of the Interstate Commerce Commission are arbitrary and capricious, are unsupported by substantial evidence and are contrary to the evidence of record in Docket No. 13914, in that:

(a) There is no proof in said record that the operations of said so-called Yonkers Branch has resulted or in the future will result in an undue burden upon interstate and foreign commerce or upon the defendant, The New York Central Railroad Company.

(b) The Interstate Commerce Commission improperly and illegally failed to give appropriate recognition to the

fact that the losses upon the so-called Yonkers Branch as found in said report of Division 4 of said Commission would be reduced by an amount in excess of \$22,000 by reason of the resultant reduction of federal income and excess profits taxes payable by the defendant The New York Central Railroad Company upon its earnings in the year 1942.

[fol. 7] (c) The Interstate Commerce Commission failed to give appropriate and proper recognition to the fact, which is a matter of common knowledge, that by reason of government restrictions upon means of transportation, other than railroads, the earnings of the defendant railroad is constantly and continuously increasing and will in the future continue to increase so long as persons are prevented by government action from using private transportation facilities, and consequently there is no basis whatever for the finding made by the Interstate Commerce Commission to the effect that there is no prospect of more favorable results for the future in the operation of the Yonkers Branch.

(d) The Interstate Commerce Commission failed to give appropriate recognition to the fact that the general revenues of the defendant The New York Central Railroad Company have been continuously and substantially increasing throughout the period used by the Interstate Commerce Commission in reaching its determination that the continued operation of the Yonkers Branch would impose an undue and unnecessary burden upon the applicant and upon interstate commerce.

(e) The evidence showed, contrary to the conclusion of the Interstate Commerce Commission, that the abandonment of the Yonkers Branch would result in serious inconvenience, delay and expense to the members of the public presently served by said branch.

Twenty-third. That the abandonment of that part of said Yonkers Branch under and pursuant to said certificate and orders of the Interstate Commerce Commission would cause a serious depreciation in property values within the area served by said branch in excess of the sum of \$2,500,000, and that the depreciation in said real estate values would cause an undue burden upon the remaining property owners of the City of Yonkers in that they would have to

carry the burden caused by this depreciation in real estate values, all to their detriment, and the owners of real property in the City of Yonkers surrounding said branch would be deprived of property rights by a depreciation of the values of their real property, and in many instances by rendering it impossible for mortgagors to renew their mortgages on such property and by destroying the equities in such mortgaged property; and in addition, it would reduce by many millions of dollars as aforesaid the assessed value of real property in the locality and the [fol. 8] taxes derivable therefrom, or would compel the City of Yonkers to spend many millions of dollars in order to provide a substitute for the branch sought to be abandoned, and the City of Yonkers is thereby aggrieved and injured by the aforesaid certificate and orders of the Interstate Commerce Commission.

Twenty-fourth. That the abandonment of the said Yonkers Branch would result in a discontinuance of four stations in the City of Yonkers; that the consent of the Public Service Commission to the discontinuance of said stations, as required by the provisions of Section 54 of the Railroad Law of the State of New York, has not been sought or obtained and that consent or permission of the Public Service Commission to the discontinuance of service upon said Yonkers branch as required by the applicable provisions of the Public Service Law of the State of New York has not been sought or obtained.

Twenty fifth. That plaintiffs will suffer great and irreparable loss and damage as aforesaid by the abandonment and dismantling of said railroad unless the relief herein prayed for is granted, in that in accordance with the resolution of the Executive Committee of the Board of Directors of the defendant The New York Central Railroad Company, its officers and agents, have been directed, upon receipt of the certificate of the Interstate Commerce Commission, to abandon and remove said Yonkers Branch, to dispose of the real estate and salvaged material, to abandon the operation of all trains on said Yonkers Branch, and to execute all such papers and to take such steps as may be requisite in the premises, and upon information and belief that it is the intention of the defendant The New York Central Railroad Company to abandon the operation of said

Yonkers Branch on May 29, 1943, and to immediately discontinue the operation of trains thereon, and to immediately dismantle its electric installations, tracks and other equipment used in connection with the operation of said branch, and transfer its rolling stock to other services, and that unless the interlocutory judgment and preliminary restraining order prayed for herein be granted the status quo cannot be preserved during the pendency of this action, and in the event that this Court finally grants the relief prayed for and sets aside the order of the Interstate Commerce [fol. 9] Commission, then the judgment of this Court could not be carried out and made effective.

Twenty-sixth. That every available means for securing a revocation of said certificate and orders of the Interstate Commerce Commission has been exhausted and the plaintiffs have no other remedy except under the injunctive process of this Court as provided by law.

Wherefore, plaintiffs pray

(1) That a summons issue under the seal of this Honorable Court and a copy of said summons and of this complaint be served upon the United States, the Interstate Commerce Commission, and The New York Central Railroad Company, as prescribed by the Federal Rules of Civil Procedure and by the statutes in such case made and provided.

(2) That this Court, as soon as practicable, convene a specially constituted Court of three judges, as required by Title 28, Section 47, Code of Laws of the United States, and that a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending until a further order of this Court the operation, execution and enforcement of said certificate and order of the Interstate Commerce Commission, dated March 20, 1943, as extended by its order of April 19, 1943, and restraining and enjoining the defendant The New York Central Railroad Company and all other persons from taking any action in pursuance of said orders of the Interstate Commerce Commission, and from in any manner abandoning or attempting to abandon and curtailing or attempting to curtail its present operation of said branch.

(3) That pending a hearing upon the foregoing application for a temporary or interlocutory injunction, a pre-

liminary restraining order be issued in terms restraining and suspending the operation, execution, effect and enforcement of said orders of the Interstate Commerce Commission and restraining and enjoining the defendant The New York Central Railroad Company as aforesaid until said application for a temporary or interlocutory injunction shall have been heard and determined.

(4) That after final hearing, this Court adjudge, order and decree that said certificate and orders of the Interstate Commerce Commission are and have at all times been beyond the lawful authority of the Commission, in violation of the legal rights of plaintiffs, and arbitrary and unreasonable and wholly null and void, and that said orders [fol. 10] be perpetually voided, set aside, suspended and annulled, and the enforcement thereof perpetually restrained and enjoined.

(5) That plaintiffs may have such other and further relief in the premises as equity and justice may require and as may be deemed by this Court to be adequate and proper under the circumstances, together with the costs and disbursements of this action.

Gay, H. Brown, Counsel to the Public Service Commission, Office & Post Office Address 80 Centre Street, New York City, N. Y.

Paul L. Bleakley, Corporation Counsel, Solicitor for City of Yonkers, Office & Post Office Address, City Hall, Yonkers, New York.

Horace M. Gray, Solicitor for John W. Tooley, Jr., president of Committee of Yonkers Commuters, Office & Post Office Address, 42 Broadway, Borough of Manhattan, City of New York.

[fols. 11-12] *Duly sworn to by John T. Ryan, et al. Jurats omitted in printing.*

[fol. 13] EXHIBIT "A" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of
The Application of THE NEW YORK CENTRAL RAILROAD COMPANY under Paragraphs (18) to (20), inclusive, of Section

1 of the Interstate Commerce Act for a Certificate that the Present and Future Public Convenience and Necessity Permit of the Abandonment by The New York Central Railroad Company of a Line of Railroad Between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York

To the Interstate Commerce Commission:

Your applicant respectfully represents:

a. The exact corporate name of the applicant is The New York Central Railroad Company.

b. The applicant is a carrier engaged in the transportation of passengers and property by railroad subject to the Interstate Commerce Act.

c. The applicant is the owner of a line of railroad between Van Cortlandt Park Junction, New York, N. Y., and Getty Square, Yonkers, N. Y., a distance of 3.1 miles. A portion of the line is located in Bronx County and a portion in Westchester County, New York.

d. Abandonment of the line by the applicant is sought.

e. The reasons, briefly stated, why the abandonment should be permitted are as follows:

1. Passenger operations which are the only operations conducted, have resulted in a substantial annual loss for several years;

2. There are adequate and convenient transportation facilities available to handle the small traffic remaining;

3. The salvageable material is needed in the prosecution of the war;

4. Continued operation represents wasteful transportation.

[fol. 14] f. The name and address of the applicant's counsel to whom correspondence in regard to this application should be addressed are as follows: Thomas P. Healy, General Solicitor, New York Central System, 466 Lexington Avenue, New York, N. Y.

g. The applicant was organized and now exists under the laws of the states of New York, Pennsylvania, Ohio, Indiana, Illinois and Michigan. It was created by the consolidation

of The New York Central and Hudson River Railroad Company, The Lake Shore and Michigan Southern Railway Company, and others, under an agreement dated April 29, 1914, which was approved by the orders of the Public Service and other commissions of the several states having jurisdiction and duly filed in the offices of the Secretaries of State of the several states of its incorporation, and in accordance with the laws thereof. This applicant is authorized to and does operate in the states of its incorporation and also in the states of Massachusetts, New Jersey and West Virginia and in the Dominion of Canada, and transports in interstate commerce, upon tariffs lawfully filed with the Interstate Commerce Commission, passenger and freight traffic.

h. The making and filing of this application were authorized on behalf of applicant by the Executive Committee of the Board of Directors by resolution adopted at a meeting held at New York, N. Y., on the 22nd day of April, 1942. A certified copy of the resolution so adopted is attached hereto, made a part hereof and marked Exhibit 1.

i. The applicant is not in receivership.

j. A map showing the territory, railroads, railroad stations, city streets, other transit facilities and important points is attached hereto made a part hereof and marked Exhibit 2.

The applicant does not desire a hearing upon this application unless the absence thereof will affect adversely the authorization of the abandonment of the line sought herein.

A return to the Commission's questionnaire in accordance with the Commission's order dated November 27, 1941, accompanies this application.

[fol. 15] Wherefore, the applicant prays that the Interstate Commerce Commission issue a certificate under paragraphs (18) to (20), both inclusive, of Section 1 of the Interstate Commerce Act that the present and future public convenience and necessity permit of the abandonment by the applicant of the line of railroad described in this application.

Dated, August 19, 1942.

The New York Central Railroad Company, R. E.
Dougherty, Vice President.

[fol. 16] *Duly sworn to by R. E. Dougherty. Jurat omitted in printing.*

[fol. 17] EXHIBIT 1 TO APPLICATION

The New York Central Railroad Company

Executive Committee, Wednesday, April 22, 1942

Resolved: That an application be made to the Interstate Commerce Commission, or any other public body having jurisdiction, for a certificate that the present and future public convenience and necessity permit of the abandonment of that portion of the Putnam Division of the New York Central Railroad, known as the Yonkers Branch, extending from the main line of the Putnam Division at Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, N. Y., a distance of 3.1 miles, and the abandonment of the operation of said Yonkers Branch trains on that portion of the main line of the Putnam Division between Van Cortlandt Park Junction and Sedgwick Avenue, New York City, the southerly terminus of the Putnam Division; and that F. E. Williamson, President, R. D. Starbuck, Executive Vice-President, or R. E. Dougherty, Vice-President, and each of them be and hereby is authorized to execute verify and file with the Interstate Commerce Commission and with any other public authority having jurisdiction, an application in such form as may be appropriate or required for a certificate that the present and future public convenience and necessity permit of the abandonment of said portion of the Putnam Division of the New York Central Railroad, known as the Yonkers Branch, and the abandonment of the operation of said Yonkers Branch trains on that portion of the main line of the Putnam Division between Van Cortlandt Park Junction and Sedgwick Avenue, New York City, and upon receipt of such certificate to abandon and remove said portion of the railroad known as the Yonkers Branch, to dispose of the real estate and salvaged material, to abandon operation of said Yonkers Branch trains on the main line of the Putnam Division, and to execute all such papers and to take such steps as may be requisite in the premises.

[fol. 18] I, J. M. O'Mahoney, Secretary of The New York Central Railroad Company, hereby certify the foregoing to

be a true copy of a resolution duly adopted by the Executive Committee of the Board of Directors of said company at meeting held in the City of New York, N. Y., on Wednesday, the 22nd day of April, 1942.

Witness my hand and the corporate seal of said The New York Central Railroad Company, at New York, N. Y., this 19 day of August, 1942.

J. M. O'Mahoney. (Corporate Seal.)

[fol. 19]

Return to Questionnaire

BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of

The Application of THE NEW YORK CENTRAL RAILROAD COMPANY under Paragraphs (18) to (20), inclusive, of Section I of the Interstate Commerce Act for a Certificate that the Present and Future Public Convenience and Necessity Permit of the Abandonment by The New York Central Railroad Company of a Line of Railroad Between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York

To the Interstate Commerce Commission:

The New York Central Railroad Company has made application to the Interstate Commerce Commission under paragraph (18) of Section I of the Interstate Commerce Act, as amended, for a certificate that the present public convenience and necessity permit of the abandonment by the applicant of a line of railroad between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York, which application accompanies this return to questionnaire. Notice that this application has been filed will be published in the form prescribed by the Commission at least once during each of three consecutive weeks in newspapers of general circulation in the counties of Bronx and Westchester, State of New York, which are the only counties and state in which the line of railroad proposed to be abandoned is situated. A copy of said notice will also be posted in a conspicuous place in each station on the line

sought to be abandoned. Notice of said publication and posting will be filed as promptly as possible with the Commission.

The applicant also submits the following information required by the Commission:

[fol. 20] 1. Complete statement of the purpose of the application.

1A. The purpose of the application is to obtain a certificate that the present and future public convenience and necessity permit the applicant to abandon its line of railroad extending from Van Cortlandt Park Junction, Bronx County, New York, to Getty Square, Yonkers, Westchester County, New York, a distance of 3.1 miles.

2. When, by whom, and for what purpose the line was constructed, and its proprietary history.

2A. The line of railroad sought to be abandoned was constructed partly by Yonkers Rapid Transit Railway Company and The Yonkers Rapid Transit Railway Company and was completed by The New York and Northern Railway Company in 1888. The branch was built for the purpose of developing suburban business between the City of Yonkers and the City of New York.

The New York and Northern Railway Company, incorporated October 11, 1887, was sold at foreclosure and reorganized January 15, 1894, as The New York and Putnam Railroad Company.

From February 1, 1894 to March 7, 1913, the line was operated under lease by The New York Central and Hudson River Railroad Company, a predecessor of the applicant. On March 7, 1913, The New York and Putnam Railroad Company was merged with The New York Central and Hudson River Railroad Company. The line proposed to be abandoned has been operated as a part of the Putnam Division of the applicant since applicant's formation in 1914.

3. A copy of the applicant's general balance sheet of the latest date available, and a copy of the applicant's income account for each of the last five calendar years, and for that portion of the current year for which the information is available.

3A. A copy of the balance sheet of applicant as of May 31st, 1942, is attached hereto, made a part hereof, and marked Exhibit 3. A copy of the income account of the applicant for the years 1937, 1938, 1939, 1940, 1941, and for the first five months of 1942, is attached hereto, made a part hereof, and marked Exhibit 4.

[fol. 21] 4. The present state of maintenance of the line.

4A. There has been considerable deferment of maintenance. The line is difficult to maintain because it is partially located along hillsides and at an elevation, crossing a number of city streets overhead, with bridges and viaduct structures.

5. The estimated salvage value of the line, with a general statement of the basis of the estimate.

5A. The estimated net salvage value of the line plus the estimated value of the equipment released for service elsewhere is \$299,823. The basis of this estimate is:

	Value
1,162 gross tons—rails and fastenings	\$24,780
39,600 tie plates	6,852
6,500 ties	4,965
Miscellaneous track material	469
989.4 net tons—structural metal	17,809
Transmission material (including Van Cortlandt Park to Sedgwick Ave. section)	50,792
Signal material (including Van Cortlandt Park to Sedgwick Ave. section)	9,643
Miscellaneous	2,083
Total	117,393
Less cost of removing	63,570
Net salvage of facilities	53,823
Value of land	31,000
Total net salvage of line	64,823
Equipment—11 multiple unit electric cars	235,000
Total net salvage, line and equipment	\$299,823

6. The names of all railroads with which the line connects for interchange of traffic and the points of such interchange.

6A. The line proposed to be abandoned does not connect with any line, other than applicant's, for the interchange of traffic.

7. A brief description of the present train service on the line, and of important changes made in the past five years.

7A. Train service consists of 17 trains, two or three cars each, in each direction, daily except Sunday. Most of the train service and travel occurs during *during* the [fol. 22] morning and afternoon commutation hours. During 1926, when the line was electrified, 71 trains were operated in weekdays. There have been progressive reductions in the service since that date, the present schedule having been in effect since the fall of 1938, immediately prior to which time there were 43 trains week days and 5 on Sunday.

8. The names of all stations on the line, stated in order with milepost numbers, with the approximate population of each, and the authority for the information, showing for each place the names of all other railroads by which it is served, or its distance by highway from the nearest other railroad. Distinguish non-agency stations.

8A.		Other Railroad Service		
Name of Station	Miles from Sedgwick Ave.	Railroad	Station	Distance Distant
Caryl	6.15	N. Y. C. Putnam Division	Lincoln	0.6
		N. Y. C. Hudson Division	Ludlow	1.4
			Mt. St. Vincent	1.2
Lowerre	6.52	N. Y. C. Putnam Division	Lincoln	0.9
		N. Y. C. Hudson Division	Ludlow	1.1
Park Hill	7.11	N. Y. C. Putnam Division	Lincoln	1.3
		N. Y. C. Hudson Division	Ludlow	0.6
Getty Square	7.79		Yonkers	1.0
		N. Y. C. Putnam Division	Dunwoodie	1.3
		N. Y. C. Hudson Division	Yonkers	0.3

The named stations are all agency stations within the City of Yonkers and have no separate population figures. Yonkers has, according to 1940 U. S. Census, a population of 142,598.

9. The approximate population of the territory served by the line, explaining how the limits of this territory are defined.

9A. The portion of the line sought to be abandoned which is in the City of New York is entirely within Van Cortlandt Park and has no resident population. The line serves a relatively small residential area in the southerly part of

Yonkers having, however, considerable number of multiple family dwellings. Assuming a tributary area bounded on the west by a line midway between the Yonkers Branch and the applicant's Hudson Division and on the east by a similar line between the Yonkers Branch and the applicant's Putnam Division main line, an area of approximately [fol. 23] 1.2 square miles, or 5.7% of the total area of Yonkers is served by the line. Assuming the population of the City to be evenly distributed over its area, the population served by the line would be 8,100. The Eighth Ward of Yonkers, which covers approximately the same area has 9% of the City's voters. Assuming population distribution in proportion to voters, the area would have a population of 12,834.

10. A detailed statement of the location and nature of the highways available for movement of the traffic now handled by the line, and of the common-carrier truck and bus service on such highways, if any.

10A. The map attached to the application and marked Exhibit 2 shows the principal city streets and other transportation lines available in the territory served by the Yonkers Branch. There are the following transportation facilities that would be used in the event of abandonment.

Broadway trolley providing access to the New York City Subway at 242nd Street:

McLean Avenue trolley line extending easterly to Lincoln station on applicant's Putnam Division main line and continuing to the Woodlawn station of the New York City Lexington Avenue subway:

Two bus lines, known as the Park Hill and the Noding Hill Lines, already serve the territory of the Park Hill, Lowerre and Garvl stations, and connect with applicant's Yonkers and Ludlow stations on the Hudson Division. Buses operate on a 12 minute headway during rush hours.

The principal commuting trains on the line sought to be abandoned are scheduled from 20 to 25 minutes apart. It would require a relatively simple schedule change for the buses to handle the people between the affected area and Ludlow station on applicant's Hudson Division, assuming all patrons would elect to travel that way rather than by other available means. At Getty Square and Park Hill there are few passengers and the alternate transportation routes are close by.

The train service ~~on the~~ Hudson Division main line is much more frequent than on the Yonkers Branch and for Grand Central station passengers has the further advantage of avoiding the transfer Yonkers Branch passengers must now make at High Bridge or University Heights. The total time for the trip using bus to Ludlow and applicant's Hudson Division trains beyond is practically the same as when using the Yonkers Branch to High Bridge and applicant's Hudson Division trains beyond.

11. The nature of the industries in the tributary territory (such as farming, mining, lumbering, manufacturing, etc.), how long established, and the extent to which each is dependent upon the line for transportation. State location and other facts concerning the most important plants served.

11A. There are no industries dependent upon the line for service. It is used exclusively for passenger business, principally by commuters going to and from Grand Central station, New York City. Trains enter and leave the branch at Van Cortlandt Park Junction and operate over the Putnam Division Main Line between Van Cortlandt Park Junction and Sedgwick Avenue station, stopping en route at High Bridge and University Heights where transfer can be made to Hudson Division trains stopping at 138th Street, 125th Street and Grand Central stations. The Sedgwick Avenue terminus is on a shuttle line of the New York subway system connecting with the Lexington Avenue and Eighth Avenue subways which reach all important points in downtown New York.

12. The passenger traffic handled on the line in each of the last two calendar years, and for that part of the current year for which the information is available, giving separately the number of local and connecting-line passengers (if the latter designation is applicable) and the revenue from each class.

12A. A statement showing the passenger traffic handled on the branch during the past two years and for the first three months of 1942 is attached hereto, made a part hereof, and marked Exhibit 5. This statement gives separately the number of local and connecting line passengers and the revenues for each class. No mail, milk or express is handled on the branch.

* 13. The freight tonnage handled by the line for each of the last two calendar years, and for that part of the current year for which the information is available, showing [fol. 25] the number of cars and the tonnage of carload freight, classified by the principal commodities, and the tonnage of less-than-carload freight. Show in separate statements (a) local freight originated at and destined to points on the line, (b) freight moved between points on the line and points beyond it; and (c) freight neither originated at nor destined to points on the line (overhead or bridge traffic).

13A. No freight traffic has been handled for many years.

14. (1) If the line to be abandoned is less than the entire mileage operated by the applicant, a statement showing the effect of the proposed abandonment on the net railway operating income of the applicant. The statement should include for each of the last two calendar years and for that part of the current year for which the information is available.

(a) The applicant's railway operating revenue from Traffic handled locally between points on the line proposed to be abandoned;

(b) The applicant's railway operating revenue from traffic originating on or destined to points on the line proposed to be abandoned and also handled on other parts of the applicant's lines of railroad;

(c) An estimate in detail of the total operating revenue that should be assigned to the line proposed to be abandoned and a statement of the reasons for such assignment;

(d) The expense of operating the line proposed to be abandoned, stated by appropriate primary accounts, actual so far as possible and otherwise approximated, with a full statement of the method used;

(e) Railway tax agreements with method of apportionment;

(f) Other items entering into the applicant's income account and assignable to the line proposed to be abandoned, with methods of assignment; and

(g) The costs of moving the traffic on the line proposed to be abandoned beyond the limits of said line [fol. 26] on other parts of the applicant's lines, with method of determination.

Revenues from freight, passenger, and other service should be shown separately.

(2) If the applicant's line is operated as part of a system under common control and management, statement for the same period as required in paragraph (1) showing the effect of the proposed abandonment on the net railway operating income of the system and the unit members thereof. This statement should show the revenues accruing to the system and its unit members from traffic moving to and from the line proposed to be abandoned and the costs of handling such traffic. The method of determining such costs also should be shown.

14A. (1).

(a) The applicant's railway operating revenue from traffic handled locally between points on the branch to be abandoned, including miscellaneous revenues, for the years 1940 and 1941 and for the first three months of 1942 is as follows:

Year	Passenger Revenue	Miscellaneous	Total
1940	\$700.00	\$15.00	\$715.00
1941	704.00	16.00	720.00
1942 (3 months)	202.00	3.00	205.00

(b) The applicant's railway operating revenues from traffic originating on or destined to points on the branch, and also handled on other parts of the applicant's line is as follows:

Year	Assignable to Branch	Assignable to System beyond Branch	Total
1940	\$11,171.00	\$37,717.00	\$48,888.00
1941	10,005.00	34,712.00	44,717.00
1942 (3 months)	2,795.00	9,704.00	12,499.00

(c) The applicant's total operating revenue assignable to the branch is as follows:

[fol. 27]

Year	Revenue
1940	\$11,886.00
1941	10,725.00
1942 (3 months)	3,000.00

The foregoing passenger revenues are allocated to the branch sought to be abandoned on a mileage pro rata basis, namely, the ratio of the distances which the passengers were transported on the branch bears to the total distance such passengers were transported over the applicant's system. The miscellaneous items were received from vending machines.

(d) The estimated annual expense of operating the line proposed to be abandoned is as follows:

Maintenance of way and structures (estimated normal maintenance)	\$16,400
Maintenance of equipment:	
Multiple unit car repairs based on cost per car mile	2,940
Transportation:	
Crew wages (portion of wages for train operation Sedgwick Avenue to Getty Square pro-rated to the branch on the basis of mileage)	7,982
Train supplies and expenses (based on cost per car mile)	1,659
Station employees (actual)	7,862
Station expense (actual)	1,161
Power expense based on cost per car mile	3,554
Total	\$41,558

(e) Annual railway tax accruals based on the 1942 tax rates and assessed valuation of land and improvements, less taxes paid by lessees—\$34,557.

(f) Other items entering into the applicant's income account and assignable to the branch proposed to be abandoned are the rents received from numerous short term leases, amount received annually—\$2,140.

(g) The cost of moving the traffic over the applicant's Putnam Division Van Cortlandt Park Junction to Sedgwick Avenue is as follows:

[fol. 28] Maintenance of way and structures (estimated normal maintenance)	\$16,400
Maintenance of equipment:	
Multiple unit car repairs based on cost per car mile	2,940

Transportation:

Crew wages (portion of wages for train operation Sedgwick Avenue to Getty Square pro-rated to the branch on the basis of mileage)	7,982
Train supplies and expenses (based on cost per car mile)	1,659
Station employees (actual)	7,862
Station expense (actual)	1,161
Power expense based on cost per car mile	3,554
Total	\$41,558

(c) Annual railway tax accruals based on the 1942 tax rates and assessed valuation of land and improvements, less taxes paid by lessees—\$34,557.

(f) Other items entering into the applicant's income account and assignable to the branch proposed to be abandoned are the rents received from numerous short term leases, amount received annually—\$2,140.

(g) The cost of moving the traffic over the applicant's Putnam Division Van Cortlandt Park Junction to Sedgwick Avenue is as follows:

Maintenance of way (estimated normal maintenance)	\$6,317
Maintenance of equipment:	
Multiple unit car repairs based on cost per car mile	4,409
Transportation:	
Crew wages (portion of wages for train operation Sedgwick Avenue to Getty Square pro-rated to the section south of Van Cortlandt Park Junction on the basis of mileage)	11,972
Train supplies (based on cost per car mile)	2,489
Power (based on cost per car mile)	5,330
Total	\$30,517

(2) A summary statement of the annual revenue that would be lost and the annual expense that would be saved

by the applicant if the line was to be abandoned is as follows:

[fol. 29] Branch operation:	
Revenue (including other income)	\$13,446
(Average of 1940 and 1941)	
Expenses, including taxes	76,115

Net annual loss, branch operation	\$62,669
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System operation beyond branch:

Revenue (Average of 1940 and 1941)	\$36,245
Expenses	30,517

Net earnings beyond branch	\$5,728
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Other items of savings:

Interest at 5% on net salvage of line of (\$64,823)	\$3,241
Interest at 5% on value of 11 multiple unit cars released (\$235,000)	11,750

Total	\$14,991
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Net annual system loss including branch operation and operation beyond branch (saving if line is abandoned)	\$71,932
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15. If the volume of freight or passenger traffic of the line has decreased during recent years, any reasons therefor.

15A. No freight traffic is handled over the line. The passenger traffic has experienced a steady decline since shortly after the line was electrified in 1926, despite the fact that electrification was undertaken for the purpose of developing increased business. The business now handled is about 25% of that handled twelve years ago. The decline has been greater than that experienced during the depression on other New York Central commutation lines in the New York area. There has been about a 35% decline since the depth of the depression, in 1933. The decline is due in part to the discontinuance of the direct service

to downtown New York formerly provided from Sedgwick Avenue via the Sixth and Ninth Avenue elevated lines, now dismantled, also by improved alternate methods of transportation available from Yonkers, particularly that afforded by the bus service to and from the Ludlow and Yonkers stations on the applicant's Hudson Division. While there has been recently an increase in commutation business on applicant's Hudson and Harlem Divisions following the gasoline rationing and tire shortage, a similar increase has not been experienced on the Yonkers Branch.

[fol. 30] 16. If the line is operated as a joint facility, and abandonment of the applicant's operations only is proposed, state fully the facts as to operation by others and the extent to which it will supply the place of the operation it is proposed to abandon.

16A. The line is not operated as a joint facility.

17. State what effort has been made to dispose of the line so as to insure its continued operation, and what, if any, transportation service will remain or may be substituted for that proposed to be discontinued.

17A. No effort has been made to dispose of the line to insure continued operation. The transportation services described in 10A herein will continue to be available. It may reasonably be anticipated that augmented bus service will bring a considerable portion of the line's patronage to existing lines of applicant.

18. A summary statement of the reasons for the application.

18A. The traffic handled on the line has declined to such an extent that the gross revenues received by the applicant from such traffic are much less than the cost of handling the traffic including maintenance and taxes. There are adequate and convenient alternate means of providing for the small amount of traffic remaining. The track metal, bridge steel and cars that will be released are urgently needed for war production.

Public convenience and necessity do not require that the applicant continue to bear the financial burden of maintaining and operating the line.

{fol. 31] STATE OF NEW YORK,
County of New York, ss:

R. E. Dougherty, makes oath and says that he is Vice President of The New York Central Railroad Company, applicant herein; that he has been authorized by proper corporate action on the part of the said applicant to verify and file with the Interstate Commerce Commission the foregoing return to questionnaire of said Commission in respect of the application in this Finance Docket; that he has carefully examined all of the statements referred to in said return and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth in such return and that all such statements made and the matters set forth therein are true and correct to the best of his knowledge, information and belief.

R. E. Dougherty.

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this 19th day of August, 1942. G. Harry Oetgen, Notary Public, Westchester Co. Certificate filed in New York Co. N. Y. Co. Clks. No. 266, Reg. No. 40454. Commission expires March 30, 1944.
(Notarial seal.)

(fol. 32)

EXHIBIT No. 3 TO RETURN

The New York Central Railroad Company

Condensed General Balance Sheet as of May 31, 1942

Assets

Investments

Road and equipment property	\$1,119,537,597
Improvements on leased property	151,925,977
Sinking funds	123,402
Deposits in lieu of mortgaged property sold	298,700
Miscellaneous physical property	50,225,318
Investments in affiliated companies	385,658,887
Other investments	40,043,614

Total Investments

\$1,747,813,495

Current Assets

Cash	\$25,691,268
Temporary cash investments	6,946,000
Special deposits	11,435,618
Loans and bills receivable	38,821
Net balance receivable from agents and conductors	8,436,613
Miscellaneous accounts receivable	12,867,291
Material and supplies	41,859,535
Interest and dividends receivable	2,913,813
Rents receivable	474,689
Other current assets	1,030,786

Total Current Assets

111,692,434

Deferred Assets

Working fund advances	\$179,932
Insurance and other funds	1,082,741
Other deferred assets	3,324,897

Total Deferred Assets

4,587,570

Unadjusted Debits

Rents and insurance premiums paid in advance	\$118,770
Other unadjusted debits	16,809,978

Total Unadjusted Debits

16,928,748

Total Assets

\$1,881,022,247

(fol. 33)

Liabilities

Stock

Capital stock	\$562,332,642
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Governmental Grants

Grants in aid of construction	6,148,306
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Long Term Debt

Equipment obligations	\$50,481,000
Mortgage bonds	502,309,000
Collateral trust bonds	68,455,200
Miscellaneous obligations	5,500,000
Amounts payable to affiliated companies	56,711,044

Total Long Term Debt

683,456,244

EXHIBIT No. 3—Continued

The New York Central Railroad Company

Condensed General Balance Sheet as of May 31, 1912

Current Liabilities

Traffic and car-service balances—Cr.	\$5,644,154
Audited accounts and wages payable	25,335,300
Miscellaneous accounts payable	2,934,277
Interest matured unpaid	1,830,720
Dividends matured unpaid	154,583
Unmatured interest accrued	5,729,788
Unmatured rents accrued	5,626,145
Accrued tax liability	31,044,532
Other current liabilities	4,296,860

Total Current Liabilities

82,596,359

Deferred Liabilities

Other deferred liabilities

39,215,308

Unadjusted Credits

Premium on funded debt	\$139,213
Insurance and casualty reserves	5,899,377
Maintenance reserves	1,465,330
Accrued depreciation—Road	2,429,052
Accrued amortization of defense projects—Road	19,410
Accrued depreciation—Equipment	298,685,706
Accrued amortization of defense projects—Equipment	2,546,714
Accrued depreciation—Misc. physical property	3,477,113
Other unadjusted credits	87,222,093

Total Unadjusted Credits

311,881,008

Corporate Surplus

Additions to property through income and surplus

\$8,033,314

Miscellaneous fund reserves

17,701,055

Profit and loss—balance

185,655,011

Total Corporate Surplus

195,389,380

Total Liabilities

\$1,881,022,247

(col. 34)

EXHIBIT No. 4 TO RETURNS

The New York Central Railroad Company

Condensed Income Account for the Years 1937-1941 and for five months ended May 31, 1942

	1937	1938	1939	1940	1941	5 Months Ended May 31, 1942
Operating Income						
Railway operating revenues	\$306,226,126	\$298,081,195	\$341,086,708	\$370,545,875	\$447,789,655	\$216,536,891
Railway operating expenses	284,000,439	237,502,383	256,884,232	278,674,980	331,438,111	157,311,014
Net Revenue from Railway Operations	\$22,225,687	\$61,178,812	\$84,202,476	\$91,870,895	\$116,351,544	\$59,225,877
Railway tax accruals	\$32,160,527	\$32,723,605	\$31,735,630	\$33,476,019	\$43,411,829	\$27,634,702
Railway operating income	\$50,065,160	\$28,455,207	\$52,466,846	\$58,394,876	\$72,939,715	\$31,591,175
Equipment rents—net	\$10,722,838	\$10,106,754	\$11,810,198	\$11,636,288	\$12,767,648	\$5,823,602
Joint facility rents—net	3,314,055	2,765,977	3,353,161	2,706,151	2,753,307	1,175,167
Net Railway Operating Income	\$36,028,267	\$15,382,476	\$37,363,427	\$44,052,437	\$57,418,760	\$24,392,406
Other Income	21,317,396	15,173,606	16,893,421	18,183,116	19,083,788	7,127,950
Total Income	\$60,345,663	\$30,756,142	\$54,196,848	\$62,235,553	\$76,502,548	\$31,720,356
Miscellaneous Deductions from Income	1,795,987	1,679,735	1,584,168	1,987,615	1,451,214	607,382
Income Available for Fixed Charges	\$58,549,676	\$29,076,407	\$52,612,680	\$60,247,938	\$75,051,334	\$21,112,974
Fixed Charges	52,197,064	49,280,764	48,103,444	48,982,854	48,805,772	19,761,849
Net Income	\$6,352,612	\$20,154,357 D.	\$4,509,236	\$11,265,084	\$26,245,562	\$11,351,125

D. Indicates deficit.

[of 35]

EXHIBIT NO. 5 TO RETURN

The New York Central Railroad Company
Passenger Traffic Originating and Terminating on the Line Proposed to be Abandoned

	Local		Connecting Line						Total	
	No. Pass.	Revenue	Putnam Div. (1)		Sedgwick Ave. (2)		Electric Div. (3)			
	No. Pass.	Revenue	No. Pass.	Revenue	No. Pass.	-Revenue	No. Pass.	Revenue	No. Pass.	Revenue
1940	7 134	\$700	23 350	\$2 643	111 680	\$14 581	193 745	\$31 664	335 909	\$49 588
1941	7 127	704	33 922	3 674	70 169	9 485	188 987	31 559	300 205	45 422
1942 (3 Mos.)	2 039	202	9 856	1 073	18 702	2 676	50 438	8 743	81 035	12 700

(1) Passengers using line to reach points on Putnam Division excluding Sedgwick Avenue.

(2) Passengers using line to reach Sedgwick Avenue.

(3) Passengers using line to reach points on the Electric Division via High Bridge or University Heights Transfer.

[fol. 36]

EXHIBIT "C" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13914

New York Central Railroad Company Abandonment

Submitted — — —

Decided — — —

Recommended that division 4 find that the present and future public convenience and necessity permit abandonment by the New York Central Railroad Company of a branch line of railroad in Bronx and Westchester Counties, N. Y.

Harold H. McLean for applicant.

George E. McVay for the Public Service Commission of New York.

Harry Hertloff for the City of New York.

Leonard G. McAneny, Harold T. Garrity, and Horace M. Gray for protestants.

Report Proposed by Lucian Jordan, Examiner

The New York Central Railroad Company on August 20, 1942, applied for permission to abandon its so-called Yonkers branch extending from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, approximately 3.1 miles, in Bronx and Westchester Counties, N. Y. Protests were filed and a hearing was held, at which the Public Service Commission of the State of New York was represented by counsel in opposition to the application. All points mentioned herein are in New York.

Construction of the Yonkers branch was completed in 1888 by the New York & Northern Railway Company. After several changes in ownership and operation it was acquired through merger by the New York Central & Hudson River Railroad Company, predecessor of the applicant, in 1913. The only connection for the interchange of traffic is with the main line of the applicant's Putnam division at Van Cortlandt Park Junction. The main line extends southerly from that point through University Heights and High Bridge to its terminal at Sedgwick Avenue, near the Harlem River, between 161st and 165th Streets. These lines are electrified.

The stations on the line, with their distances in miles from Sedgwick Avenue and from the nearest station on another railroad, in that order, are Caryl, 6.15, 0.6; Lowerre, 6.52, 0.9; Park Hill, 7.11, 0.6; and Getty Square, 7.79, 0.3. The tributary territory, with boundaries midway between the branch and other lines of railroad, is 1.2 square miles in area, or 5.7 per cent of the City of Yonkers. Its population is estimated by the applicant at not more than 13,000, based on the number of voters in the Eighth Ward, which covers approximately the same area. No industries are dependent on the line for service.

No freight is handled on the branch. Passenger service is rendered daily except Sunday by 17 trains making round trips between Getty Square and Sedgwick Avenue. Of these 17 trains, 12 are 2-car, four are 3-car, and one is a 4-car operation. There has been no change in the number of scheduled trains or cars operated since the fall of 1938. Prior to that time several reductions had been made from time to time in the number of trips operated, because of the gradual reduction of the number of passengers using the line. In 1926, when the branch was electrified, 71 trains were operated on week days. It was anticipated that the change [fol. 37] to electric power would result in increased patronage, but the number of passengers carried since that time has declined materially. The abandonment of the Sixth Avenue and Ninth Avenue elevated lines in December 1938 and June 1940, respectively, contributed to the reduction in patronage of the branch. Those lines formerly furnished service from Sedgwick Avenue to downtown New York. Improved alternate methods of transportation between Yonkers and New York have also tended to take business from the line.

The Yonkers branch is paralleled generally on the east by the applicant's Putnam division, with which it connects, and on the west by the so-called Hudson division, leading to the Grand Central Station in New York City. Most of the patrons of the branch travel regularly between Yonkers and the Grand Central station. The applicant has another line, the Harlem division, paralleling the Putnam line on the east, and extending from points north of Yonkers to a connection with the Hudson division south of Sedgwick Avenue, near 149th Street. The Hudson line has four stations within the City of Yonkers; namely, Ludlow,

Yonkers, Glenwood, and Greystone. The stations on the Putnam main line, within Yonkers, are Lincoln, Dunwoodie, Bryn Mawr, Nepperhan, Gray Oaks, and Nepera Park. There are also five stations on the Harlem line just east of Yonkers; namely, Wakefield, Mt. Vernon, Fleetwood, Bronxville, and Tuckahoe. A bus line operates regularly between points on the Hudson line and Caryl, and another operates between that line and a point within half a block of Lowerre. A trolley line extends from Getty Square southerly to a connection with the Broadway subway at 242nd Street. Another trolley line extends from a point about midway between Lowerre and Park Hill to Lincoln, and affords connection with a subway line leading into New York.

A witness for the applicant testified that under the present schedules the time required for travel between Lowerre and the Grand Central Terminal, including the transfer to the Hudson line at High Bridge, averages 40.2 minutes, and the average cost on the basis of a monthly commutation ticket is 16 cents one way. He stated that the most feasible alternate route is by bus from Lowerre to Ludlow on the Hudson line, at which point the train is available to the Grand Central. That route requires 42.4 minutes and costs 22 cents, or 6 cents more than the present travel over the branch. Travel by the Broadway trolley from a point 0.18 miles from Lowerre to 242nd Street, the subway to Marble Hill at 225th Street, and the Hudson division train from that point to the Grand Central, is said to require 50.1 minutes and to cost 23.9 cents. A fourth method was described as follows: Broadway trolley to 242nd Street, the Broadway subway to Times Square, then the shuttle to Grand Central Terminal, total time 57 minutes, and the cost 19 cents. The trip to Times Square may be made under the present arrangement by using the Yonkers branch to Sedgwick Avenue, the shuttle to 155th Street, the Eighth Avenue subway to 42nd Street, and a 5-minute walk to Times Square. This would involve a total of 45 minutes and cost 15.6 cents.

The superintendent of the company operating the Broadway trolley lines testified that two of his lines are operated through Getty Square. They converge near Park Hill and extend south on Broadway to 242nd Street, where the subway may be entered. The trolley line closely parallels the

Yonkers branch throughout its length. The company operates 55 cars and has five in reserve. The record shows that the traffic on the trolley line is light, and that substantially more passengers could be carried without difficulty. The witness expressed the view that if the branch is abandoned the trolley line will be able to handle the expected increase in business.

[fol. 38] The president of the bus company which operates two bus routes between points on the Hudson and Yonkers lines testified that his company could place two extra busses of 25 capacity each in service to handle additional passengers if the branch is abandoned. There has been an increase of about 15 per cent in the number of passengers handled during the past year, and during the rush hours the busses have some standing passengers. It is his opinion, however, that by adding two units of equipment the busses could handle the increased business resulting from the proposed abandonment. The bus fare is five cents.

Most of the witnesses testifying in opposition to the application are residents of Yonkers who use the line regularly in travel to and from many locations in New York City. Various alternate methods of travel have been tried by the witnesses. The record shows that the Yonkers branch affords *between* service than the other routes used. In most cases the alternate routes required from 10 to 25 minutes more time, and in some instances, depending upon the method of travel used, the excess time was an hour more. Some of the travelers had not tried certain routes suggested by the applicant as being reasonably convenient.

The Director of Civilian Protection for Yonkers urges that the line be retained for use in case of enemy air-raids or similar emergencies. It is his opinion that convenient use could be made of the branch in evacuating people from the city or bringing in needed supplies. The record shows that in case of extensive evacuation the movement would be to the north of Yonkers, whereas the line extends southerly to the connection with the Putnam line. The latter extends to points north of Yonkers.

The Deputy Tax Commissioner of Yonkers expressed the view that the area tributary to the branch is somewhat more extensive than that assigned by the applicant, and that the population thereof was 38,204 in 1940. The assessed value of the land and improvements of the area is \$27,901,250. A real estate broker of Yonkers testified that

in his opinion that valuation would be decreased approximately 10 percent if the line is abandoned.

Passengers carried on the branch during the years 1940-1941 and the first six months of 1942 are shown, in order, as local 7,134, 7,127, 3,735; interline, (a) intermediate points on the Putnam division 23,350, 23,922, 19,833, (b) Sedgwick Avenue 116,680, 70,169, 36,367, (c) University Heights and High Bridge transfers 193,745, 188,987, 101,359; totals 335,909, 300,205, 161,601. Financial statements submitted by the applicant, for the purpose of showing the effect of the proposed abandonment upon the applicant's revenues, set forth the following: System revenues from traffic handled on the branch during each of the years 1940-41 and the first six months of 1942, in order, including negligible amounts from vending machines, \$49,503, \$45,438, \$24,494, of which \$11,886, \$19,725, and \$6,000 have been assigned to the branch on a mileage basis. The estimated annual expense of operating the branch, based on the records of expenditures for the years 1934-37 and 1940-41 and the first three months of 1942, is shown as \$41,558. The cost of moving the traffic of the line over other parts of the system is shown as \$30,517; railway tax accruals \$34,557, and miscellaneous rents, credit, \$2,140. These figures indicate that the estimated annual loss from operation of the branch is \$56,941, on the basis of the average revenues for the years 1940 and 1941, including rents and the small amounts of income from vending machines.

In determining the income, the branch has been credited with all revenues earned on the haul of the passengers between points on the branch and points of destination in New York City. No expense of operation incurred beyond [fol. 39] the line has been included except the estimated out-of-pocket cost of moving the traffic between Van Cortlandt Park Junction and Sedgwick Avenue. This amount will be saved if the line is abandoned. The principal items of operating expenses on the branch are shown as maintenance of way and structures \$16,400, maintenance of equipment \$2,940, train-crew wages \$7,982, station employees \$7,862, and cost of electric power \$3,554. Station employees' expenses are actual. The other expenses are estimated on the basis of the usual costs for such items under normal conditions of operation. The actual cost of maintenance of way and structures for 1940 was \$16,286. The cost for 1941 was \$23,817, including \$900 in connection with

stations and office buildings, considered as being in excess of the annual normal expenditures for such items. The amount shown for taxes is based on the 1942 tax rates and assessed valuation of the land and improvements of the branch, less the small amount of taxes paid by lessees.

While the line proposed to be abandoned is only 3.1 miles in length, the train operations to be discontinued extend from Gettý Square to Sedgwick Avenue, approximately 7.8 miles. Trains will continue to be operated over the Putnam line between the end of the branch and points in New York City. The proposed abandonment, however, would enable the applicant to salvage a considerable quantity of transmission and signal materials from the segment beyond the branch to Sedgwick Avenue. The record shows that the line is difficult to maintain because it is located along hill-sides and crosses nine city streets overhead by means of bridges and viaducts. Another bridge carries a street over the railroad. The line is double track, laid throughout with treated ties and ballasted with cinders. About 80 percent of the rail is 105-pound and the remainder is 100-pound. The track has been maintained sufficiently to insure safe operation, but the applicant represents that maintenance has been deferred to some extent, particularly with respect to ties and ballast.

The estimated net salvage value of the materials to be recovered if the application is granted is \$53,823, and the value of the land used is \$11,000. The abandonment would also release for use on other lines 11 units of electric equipment, valued at \$235,000. It is proposed to transfer this equipment to the Harlem division, which is powered by electricity. In turn certain coaches used on the latter line, which are suitable for use in trains operated by steam, will be released for service on other parts of the system.

The record shows that the total business of the Yonkers branch is only about 25 percent of the volume of 12 years ago. While the commuter traffic on the Hudson and Harlem divisions has increased approximately 12 percent during the past year, that of the branch has increased only 2.87 percent, and there is nothing to indicate that any substantial increase will be experienced in the future.

It is apparent from the record that the branch is being operated at considerable loss to the applicant, and that its abandonment would not result in serious inconvenience to the public. Its continued operation would impose an undue

burden upon the applicant and upon interstate commerce and is not warranted.

It is recommended that division 4 find that the present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of the branch line of railroad in Bronx and Westchester Counties, N. Y., described herein. An appropriate certificate should be issued.

[fol. 40]

EXHIBIT "D" TO COMPLAINT

Before the Interstate Commerce Commission

Docket No. FD-13914

In the Matter of the application of the New York Central Railroad Company for a certificate of public convenience and necessity permitting abandonment of the line of railroad extending from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, New York.

Exceptions of City of Yonkers, Protestant, to Report and Order Proposed by Examiner Jordan

The City of Yonkers, New York, protestant, excepts to the report and order proposed by Examiner Jordan in the following respects:

I. To that portion of the report, Sheet 2, reading as follows:

"Improved alternate methods of transportation between Yonkers and New York have also tended to take business from the line"

II. To that portion of the report, Sheet 3, reading as follows:

"The record shows that the traffic on the trolley line is light and that substantially more passengers could be carried without difficulty"

III. To that portion of the report, Sheet 3, reading as follows:

"The President of the Bus Company which operates two bus routes between points on the Hudson and

Yonkers lines testified that his Company could place two extra busses of twenty-five capacity each in service to handle additional passengers if the branch is abandoned * * *. It is his opinion however that by adding two units of equipment the busses could handle the increased business resulting from the proposed abandonment".

IV. To that portion of the report, Sheet 4, reading as follows:

"The record shows that in case of extensive evacuation the movement would be to the north of Yonkers whereas the line extends southerly to the connection with the Putnam line".

V. To the fact that no consideration was given to that portion of the report, Sheet 4, reading as follows:

[fol. 41] "The Deputy Tax Commissioner of Yonkers expressed the view that the area tributary to the branch is somewhat more extensive than that assigned by the applicant and that the population thereof was 38,204 in 1940. The assessed value of the land and improvements of the area is \$27,901,250.00. The real estate broker of Yonkers testified that in his opinion that valuation would be decreased approximately 10% if the line is abandoned".

VI. To that portion of the report, Sheets 5 and 6, reading as follows:

"Its continued operation would impose an undue burden on the applicant and upon Interstate Commerce and is not warranted. Its recommendation that Division 4 find that the present and future public convenience and necessity permit abandonment by the New York Central Railroad Company of the branch line of railroad in Bronx and Westchester County, New York, described herein. An appropriate certificate should be issued".

and further excepts to the failure of the report to recommend an order denying the abandonment.

The grounds of such exceptions are the following:

I

The Examiner's Report Is In Error In Concluding That Improved Alternate Methods of Transportation Be-

tween Yonkers and New York Have Also Tended to Take Business From the Line

There does not appear to be any foundation in the evidence for this conclusion. While it is true that there is considerable evidence of "alternate methods" the record does not go any further unless the Railroad contends that establishment of bus service of and in itself constitutes "improved alternate methods". The bus service is not now nor do we understand that the Railroad so claims. Certainly there is no proof that the bus service has been materially altered for the better or referring to the other possible alternate methods of transportation that the Trolley Company or the Railroad itself on its other lines have either one instituted any substantial improvement. The inevitable conclusion is that all of the methods of transportation have remained more or less stagnant except service on the line sought to be abandoned which has become worse.

So far as comfort and convenience are involved it is beyond question that the railroad transportation is far superior to trolley, bus or subway. (See Sheet 3 of report). [fol. 42]. The line has not done the business it formerly did but it certainly cannot be deemed established that this was the result of improved alternate methods of transportation. From the present record it is just as logical to assume that business dropped because trains were taken off as it is to say that trains were taken off because business dropped.

For example see the first two questions asked by Mr. McAneny in his cross-examination of Mr. Pansky commencing on page 130 of the stenographic record.

II

The Examiner's Report is in Error in Concluding That Traffic on the Trolley Line is Light and That Substantially More Passengers Could Be Carried Without Difficulty

This conclusion in the report is un- edly taken from the testimony of Mr. Keller, Superintendent of the Trolley Company that operates in Yonkers. His deductions are virtually all founded on one check made on September 18, 1942, at Caryl Avenue and South Broadway, which is at the Yonkers-New York City line (page 86). The point at which this check was made is of particular significance.

It must be borne in mind that the two lines that run southward from Getty Square to the subway at 242nd Street continue northerly beyond Getty Square which is the center of the main business and shopping section of Yonkers (Warburton Avenue line runs to Hastings, page 85, and Park Avenue line to Palisade Avenue and Roberts Avenue, Page 85) and that therefore these lines not only transport the public to and from the subway terminus at 242nd Street, New York City, but must handle, in addition, a large volume of business and shopping traffic from both north and south in transit to and from the center of the City. Naturally none of this local traffic would be included in any count made at the southerly City line when only the commuters would be on the cars. In other words, the count made at Caryl Avenue definitely does not give a true picture of the traffic conditions nor does it convey the complete situation in relation to whether the Trolley Company has facilities to adequately absorb all or part of the increased volume of traffic which would result from an abandonment of the [fol. 43] Putnam Division, Yonkers branch. Yet even the check which was made does show an overload at certain times (page 94). Furthermore, the statement that traffic on the trolley line is light ignores entirely the twenty-five per cent increase in trolley traffic over the previous year (page 96) and that further increases are anticipated (Pages 95-96). In all twenty-nine cars operate on the Warburton Avenue and Park Avenue lines (page 98). No. 1 line is Warburton Avenue and No. 2 is Park Avenue (page 89). There are a total of fifty-five cars in operation on the entire Yonkers system and only seven in reserve (pages 88-89; 98). With the admitted twenty-five per cent increase in traffic and with the anticipated further increase, how can it be said on this record that all of the facilities of the Trolley Company may not be absorbed and even overtaxed without imposing an additional burden by the abandonment of one of the existing methods of transportation.

III.

The Examiner's Report is in Error in Placing Reliance Upon the Statement of the President of the Bus Company that Two Units of Equipment Could Be Added Which Could Handle the Additional Traffic

This conclusion would appear to be founded wholly on a bit of wishful thinking or perhaps we should say wishful

hoping on the part of the President of the Bus Company. (See the testimony of Mr. Pansky, pages 131 to 132). The use of the very busses that he would expect to employ has been curtailed by the office of Defense Transportation. Of course he was an extremely reluctant witness in this respect but the implications flowing from his testimony are only too clear. The authorities are seeking to curtail the use of busses and yet if the present abandonment were to be permitted their use would necessarily be extended with the resultant added consumption of oil, gas, tires, etc. With the stringent regulations now in effect this would be very poor policy to say the least. Mr. Voohres agrees that bus transportation is to be curtailed about fifteen per cent (page 57) and Mr. Pansky explains that if this curtailment becomes effective his equipment would be running more nearly to capacity (page 137). He also admits that even at the present time there are standees at peak hours (page 138).

[fol. 44] Again we say that the evidence demonstrates conclusively that the present transportation facilities are now operated at or near capacity and that future loads are imminent and that less equipment will be available for use.

IV

The Report is in Error in Failing to Give Appropriate Consideration and Weight to the Testimony of the Director of Civilian Protection for Yonkers

This exception may be divided into two parts—evacuation and bringing in of supplies. The report endeavors to dispose of one contention (evacuation) but ignores the other completely. While it is true that any evacuation would probably be to the north and that the line sought to be abandoned runs south from Getty Square yet this does not by any means dispose of the question. In the event of a northerly movement of any substantial portion of the population there would be available the highways and, in addition, the Hudson River line of the railroad, the main line of the Putnam and the Harlem Division of the Railroad. In the event of damage to either the Hudson River or the Harlem Division, the line sought to be abandoned would be an invaluable feeder to the main line of the Putnam Division. In transporting supplies the line could perform a most vital function in either direction, by con-

veying medical or other essential material northward from the vast storehouses in New York City or by transporting farm produce, for example, which had been conveyed to Yonkers by truck or some other method to New York City. In case of an emergency, such as might result from an air raid, any means of transportation is vital and could very well be an important factor in reducing the extent of a catastrophe.

V

The Testimony of the Deputy Tax Commissioner and of the Real Estate Expert Should Have Received Greater Consideration in the Formulation of the Conclusions in the Report.

While the report mentions the testimony of the Deputy Tax Commissioner of the City of Yonkers regarding the assessed valuation and the testimony of the real estate report as to the reduction in values, this evidence is not considered in the conclusion of the Examiner.

[Pl. 45] This factor is one which cannot rightfully be ignored and considerable weight should be given thereto. Not only as to those members of the public who own property within the area served by the road, many of whom undoubtedly acquired their holdings because of the railroad's facilities, but the municipality itself should not be ignored. The distress of municipalities generally due largely to reduction in real estate values is common knowledge and is too well recognized to require comment. Any factors tending to aggravate that situation should be carefully avoided. The Railroad bases its plea for abandonment on the claim that this particular line is a losing proposition, yet its condensed income account (Exhibit 4) shows it to be in a flourishing condition as to operations on its entire system with net income increasing at a rate which is staggering. Anything which affects property values in any substantial part of the City is to the detriment of every inhabitant and to the municipality itself.

VI

The Finding in the Report to the Effect that the Continued Operations of the Line Would Impose an Undue Burden Upon the Applicant and Upon Interstate Commerce and is Not Warranted and the Recommendations Based

Thereon That Present and Future Convenience and Necessity Permit the Abandonment is Not Warranted from the Record and Ignores Many of the Vital Factors Which Should be Considered

The report and recommendation in fact adopt the railroad's contentions and arguments in toto and fail to give appropriate consideration either to the inadequacy of other methods of transportation under present conditions or to the readily apparent further inadequacy which will ensue if the other methods of transportation are required to assume the obligations of transporting the persons who can no longer use the abandoned railroad.

Another factor which has not been taken into consideration is the admitted increase in traffic on all of the available carriers, that is the railroad, the bus and the trolley. Nor is proper consideration given to the definitely potential restrictions in the very immediate future upon other methods of transportation particularly bus transportation.

[fol. 46] The Railroad claims that the line in question has been operating at a substantial loss and further claims that there will be certain salvage value in the abandonment equipment. These two factors would appear to be so unimportant when compared with the multitude of arguments on the other side as to be of little or no importance.

Exhibit 4 constituting part of the return to the questionnaire shows that the net income of the railroad for the year 1941 was \$26,245,562.00 and that for the first five months of 1942 the net income was \$11,351,126.00. The significance of these figures becomes more apparent when it is considered that as late as 1936 there was a deficit of \$20,154,357.00. The spread between 1938 and 1941 is over \$40,000,000.00.

The relatively small loss on the branch line in question is unimportant when the elements of public convenience and necessity are involved. Even the Bus Company, which is not to be compared in magnitude with the Railroad, does not anticipate a profit from operations on all of its branch lines (page 136).

One thing that stands out very clearly from the record is that there has been a substantial increase. It is common knowledge that one of the main objectives of air raids is the railroad lines of the enemy countries for every railroad which is destroyed or put out of commission for even a

short period of time is deemed of great importance. We do not know when this country may be subjected to this form of warfare. It would seem unnecessary to argue that by abandoning an established railroad we were doing the very thing which our enemies seek to accomplish.

In conclusion, we respectfully state that the recommendation of abandonment is based wholly upon the relatively unimportant factors affecting the Railroad Company and ignores completely the public convenience, necessity and safety.

It is respectfully submitted that the Commission should find that the continued operation of the line will not impose an undue burden upon the applicant and upon Interstate Commerce and that the continued operation is warranted [fol. 47] and that the present and future convenience and necessity do not permit abandonment by the New York Central Railroad Company of the branch line of the Railroad in the Bronx and Westchester Counties, New York, as requested herein.

It is respectfully requested that oral argument be permitted herein.

Respectfully submitted, Paul L. Bleakley, Corporation Counsel of the City of Yonkers, Attorney for Protestant City of Yonkers, Office & P. O. Address, City Hall, Yonkers, N. Y.

[fol. 48]

EXHIBIT "E" TO COMPLAINT

Before the Interstate Commerce Commission

In the Matter of the application of the NEW YORK CENTRAL RAILROAD COMPANY for a Certificate of Public Convenience and Necessity Permitting Abandonment of the Line of Railroad Extending from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, New York

Docket No. —

FD-13914

Due February 15, 1943

Exceptions to Proposed Report

The Committee of Yonkers Commuters, Protestant, excepts to the proposed report herein filed by Hon. Lucian

Jordan, Examiner, and prays that the Application herein be denied for the reasons hereinafter set forth.

Request for Oral Argument

The said protestant requests that it be granted the opportunity to present oral argument by its counsel upon this application before the Fourth Division of the Interstate Commerce Commission in accordance with the General Rules of Practice before said Commission.

First Exception

Protestant excepts to the statement of fact appearing on sheet 1, lines 16-18, of the proposed report that:

"The only connection for the interchange of traffic is with the Main Line of the applicant's Putnam Division at Van Cortlandt Park Junction."

because the same is erroneous and contrary to the evidence since it appears by Exhibit 1 and also at pages 21 and 22 of the Transcript of Hearing that connections for the interchange of traffic between the trains of the Yonkers Branch and of the Hudson Division of the applicant's system exist at High Bridge, Norris Heights and University Heights.

Second Exception

Protestant excepts to the statement on sheet 1, lines 25 and 26 that Caryl is 0.6 and Lowerre is 0.9 miles from the nearest station on another railroad as misleading because it appears at page 24 of the transcript that Caryl is 1.4 miles from Ludlow and by the Return to Questionnaire, [fol. 49] page 5, that Lowerre is 4.1 miles from Ludlow. Lincoln, the nearest station on the Putnam main line receives no bus service and the trolley service to that station along McLean Avenue is slow and unsatisfactory and the train service at Lincoln Station is inadequate (Tr. pp. 160, 200).

Third Exception

Protestant excepts to the statement of fact on sheet 1 of said proposed report at lines 27 and 31 and on sheet 2, lines 1 and 2, in that the same is inaccurate, incomplete and misleading and contrary to the evidence since it appears by the testimony of the Commissioner of Assessment and Taxation of the City of Yonkers at pages 144 to 149

of the transcript that the area served by the Yonkers Branch includes the fourth, seventh and eighth wards of the city in its most thickly populated section containing a total population in 1940 of over 38,000.

Fourth Exception

Protestant excepts to the statement of fact on sheet 2 of said proposed report, lines 23-25, that

"Improved alternate methods of transportation between Yonkers and New York have also tended to take business from the line."

on the ground that the same is misleading and without support on the record in that there is no evidence that the alternate routes testified to by Mr. Voorhees at pages 34-37 are commercially practical or were ever voluntarily adopted by any commuters between Yonkers and New York in the area served unless forced to do so because of the inadequate service supplied by the applicant on the Yonkers Branch during the last few years. Mr. Voorhees, for the applicant, admitted (Tr. p. 34) that the most feasible alternate route would be by bus to Ludlow Station, but the bus traffic has increased 15 per cent during the last year (Tr. p. 136) and at the time of the hearing there were already many standees in the buses during the hours of heavy traffic (Tr. pp. 137, 176, 185, 196, 197).

Since then, due to further gas and rubber restrictions, conditions are much worse and an added load of some 600 daily commuters from the Yonkers Branch would present [fol. 50] a transportation problem impossible to surmount with existing facilities.

The present bus line cannot increase its service with its local equipment and has available only two busses which had been in use in New York City, the use of which was discontinued under government regulations to conserve tires and gasoline. Further gas and rubber restrictions have also added to the bus traffic by school children who use the bus service just at the commuter peak (Tr. pp. 175-6).

It was announced in the Yonkers local press on February 3, 1943, that the Office of Defense Transportation has requested the bus company to prepare and file sets of plans providing for reduction of operations by 10%, 20% and

30% so that such plans may be put into operation instanter upon orders from the Office of Defense Transportation.

It is requested that the Commission defer action on this application until it may make, independently, an investigation of bus and surface car transportation conditions due to developments since the hearing on November 12, 1942, as affecting the area served by the branch sought to be abandoned.

Fifth Exception

Protestant excepts to the description of routes on sheet 3, lines 1-17 because it fails to include an efficient present route from Yonkers to Sedgwick Avenue, thence by shuttle to 167th Street on the Lexington Avenue Subway (IRT) and thence by express to Grand Central Station and downtown without change, as described at pages 70-71 of the transcript. Thus the cost of transportation to downtown New York would be less than that of passengers who transfer at High Bridge or University Heights and take the subway at Grand Central Terminal.

Sixth Exception

Protestant excepts to the statement on sheet 3, lines 23, 25, that:

"The trolley line closely parallels the Yonkers Branch throughout its length."

as misleading and inaccurate because the Lowerre station is .18 miles and the Caryl station is .23 miles east of the Broadway trolley line which parallels the Branch (Tr. pp. 35, 116.)

[fol. 51]

Seventh Exception

Protestant excepts to the statement on sheet 3, lines 33-35, as incomplete and misleading in that it appears by the record that the equipment of the bus company in Yonkers is now operating at capacity during peak hours (Tr. pp. 137, 138) and that the two busses referred to by the Examiner have been withdrawn from operation in New York City under Governmental regulation (Tr. pp. 129, 131, 132) and it does not appear that the Office of Defense Transportation would permit their transfer to Yonkers to sup-

plant rail transportation now existing on the Yonkers Branch.

In fact it appears that the original request for the bus franchise was based in part upon the circumstance that the poor service rendered by this applicant on the Yonkers Branch was driving away business (Tr. pp. 130, 131) from the Branch and creating a demand for bus service.

There is no doubt that the bus service must be increased—with consequent greater consumption of gas and rubber—if the Yonkers Branch service is stopped (Tr. p. 129). It is ridiculous even to consider whether two 25 passenger buses could accommodate some 600 additional passengers during peak periods.

Eighth Exception

Protestant accepts to the statement on sheet 4 at lines 39-41 as confusing and incomplete since it appears at page 13 of the Return to Questionnaire that the apparent annual operating loss is but \$22,384—excluding taxes—upon the calculations of the applicant and upon the assumption that its allocation of earnings to the Yonkers Branch is fair and accurate. If the taxes are excessive—and they would seem to be if the Branch is operating at a loss—the applicant should have made a bona fide effort to have them reduced to a point where the applicant would receive value therefor.

In 1941 an additional \$5,000 was spent on painting bridges (Tr. p. 44), but, nevertheless, the average annual maintenance cost for a period of over 7 years was only \$15,400 (Tr. p. 42). When applicant's alleged loss is compared with net income of \$26,245,562 for 1941 (Return to Questionnaire, p. 19) and an apparent increase over that [fol. 52] for 1942, it is difficult to imagine that the Yonkers Branch could "cripple" applicant's main line or affect its utility or service as an artery in interstate and foreign commerce.

The applicant could not give the cost of operating the Yonkers Branch per car mile (Tr. p. 125). There are no grade crossings to be eliminated and there is no factual support in the record as to any difficulty above the normal in maintaining the line. As it is located along hill sides the road bed is well drained and there is no record of any wash-out or land-slide.

Ninth Exception

Protestant excepts to the statement on sheet 5 at lines 44-49 that

"While the commuter traffic on the Hudson and Harlem divisions has increased approximately 12 per cent during the past year, that of the branch has increased only 2.87 per cent, and there is nothing to indicate that any substantial increase will be experienced in the future."

is inaccurate and misleading since it appears that much of the commuter traffic comes to the Hudson division from the Yonkers Branch (Tr. p. 49). The 2.87% increase in commuter traffic related only to the seven months' period from January 1, 1942, at August 1, 1942 (Tr. p. 51). The alleged 12% increase is a *combined* figure* (Tr. p. 51) and should be broken down for each line. The 2.87% figure relates only to commutation and multiple trip tickets (Tr. p. 51) and does not include full rate and cash fares. Those items should be cleared up.

Observation of traffic on the Branch since the hearing in November, 1942, indicates a marked increase, which should be the subject of a further check to provide a true picture of conditions now resulting from the tightening of gasoline and rubber restrictions and in the use of private automobiles.

Tenth Exception

Protestant excepts to the conclusion in the report on sheet 5, lines 50-5 that:

"It is apparent from the record that the branch is being operated at considerable loss to the applicant."

[fol. 53] because:

1. It does not appear that the applicant has used reasonable diligence to reduce costs of operation below revenue.

2. The applicant has clearly discouraged use of the Branch to divert traffic to its Hudson division, where such traffic is used to "fill in".

3. The line is susceptible of development as a remunerative independent inter-urban line for express passenger traffic.

4. It does not appear that the total revenue derived from Yonkers traffic on the three lines operated by the applicant in the Yonkers area is less than the combined expense of operation of such lines:

5. Traffic upon the Branch has perceptibly increased since August 1, 1942, as of which date the 2.87 per cent increase in traffic was computed. The Branch should not be abandoned at least while the traffic curve is rising and no heavy capital outlay is imminent.

Eleventh Exemption

Protestant excepts to the conclusion in the report on sheet 5, lines 52-53, that the abandonment of the Branch:

"would not result in serious inconvenience to the public"

because:

1. The report finds (sheet 3, lines 47-49) that "the record shows that the Yonkers branch affords better service than the other routes used."

2. The report finds (sheet 3, lines 49-52) that "In most cases the alternate routes required from 10 to 25 minutes more time, and in some instances, depending upon the method of travel used, the excess time was an hour more."

3. The record does not reflect the existing critical condition of alternate transportation in Yonkers brought about by stringent restrictions recently placed upon the use of gasoline and rubber since the hearing before the Examiner herein was held last Fall.

[fol. 54] 4. The report finds (sheet 3, lines 1-3) that "the most feasible alternate route is by bus from Lowerre to Ludlow on the Hudson line, at which point the train is available to the Grand Central" but the capacity of the bus line has already been reached at the peak hours of commuter travel and the bus facilities cannot be expanded to accommodate the traffic that would result from an abandonment of the Branch; but will in all probability be decreased

as a measure of defence conservation of essential materials.

5. During the present war emergency all sacrifices and inconveniences in transportation should not be imposed upon the commuting public, many of which are engaged in the war effort, for the sole benefit of the applicant through the reduction of its taxes and the increase of revenue to it from the same traffic forced to patronize its Hudson division at additional cost per trip to each passenger.

Twelfth Exception

Protestant excepts to the conclusion in the report on sheet 5, lines 53-55, that the continued operation of the Branch

"would impose an undue burden upon the applicant and upon interstate commerce and is not warranted."

because:

1. The alleged burden, if continued, would not cripple applicant's main lines or even affect its utility or service as an artery of interstate and foreign commerce.

2. The alleged burden, if continued, would not operate as an obstruction to interstate commerce in that interstate users of applicant's other lines would enjoy no better rates and no better service if and when the Yorkers Branch were to be abandoned.

3. If the applicant were to make a *bona fide* effort to develop traffic upon the Branch it could be made reasonably profitable.

Thirteenth Exception

Protestant excepts to the conclusion in the report on sheet 6, lines 1-5, that

[fol. 55] "the present and future convenience and necessity permit abandonment by the New York Central Railroad Company of the branch line of railroad in Bronx and Westchester Counties, N. Y., described herein."

because:

1. The area served by the Branch has been developed and built up by reason of the existence of the Branch and of the

convenient transportation service offered by the Branch primarily to induce such development and the heavy capital investment made therein by many Yonkers residents.

2. The abandonment of the Branch would cause serious loss to the owners of real estate in Yonkers in the area served by the Branch and would cause many families to move to localities where convenient means of transportation are provided.

3. The abandonment of the Branch would result in a serious reduction in assessed valuation of real property in a large area amounting to approximately \$2,700,000 with consequent reduction in tax returns from such area and a corresponding increase in the City tax rate to meet budgetary requirements.

4. The abandonment of the Branch and its consequent destruction would prevent—except at prohibitive expense—the future establishment of a rapid and convenient means of transportation between Yonkers and way stations and the New York City subway system which would obviously be as remunerative as it was when the Ninth and Sixth Avenue Elevated Lines were acting as feeders to the Branch which, in 1926, operated 71 trains daily and a service on Sundays.

5. The abandonment of the Branch and its consequent destruction would eliminate an existing efficient means of relieving congestion in commuter traffic on the applicant's Hudson division as such traffic develops north of Yonkers.

Argument

This is an application for permission to abandon a going railroad line in a thickly populated inter-urban area that serves over 600 passengers twice daily, night and morning.

Such abandonments have been permitted by the Commission in the past when the traffic on the line has been continually decreasing in spite of all reasonable efforts by the [fol. 56] carrier to attract business, as was the situation in *Colorado v. U. S.*, 271 U. S. 153; or when the carrier would be obliged to go to heavy expense to eliminate grade crossings on a line whose traffic had been adversely affected by new rapid transit facilities, as in *Transit Commission et al.*

v. *U. S. et al.*, 284 U. S. 360. But in these leading cases the controlling fact was the certain prospect of continuous reduction in revenue through constantly decreasing traffic.

In the case at bar, traffic is on the up-swing. It is impossible to predict when, if ever, the increase will stop and, if so, at what point in relation to cost of operation.

Again, the applicant in this case is not faced with the obligation of an enormous immediate outlay, as in the Whitestone Landing case, *supra*, (284 U. S. 360) where grade crossing elimination would have required an expenditure of some \$2,000,000 to sustain a losing line with no future.

In the *Colorado* case, *supra*, freight rates had been reduced in an unsuccessful effort to increase traffic (82 L. C. C. 310, 311). Nothing appears in the record in this case to indicate that this applicant has taken any measures to increase traffic. But, on the other hand, connections at transfer points and the elimination of service after 7:00 o'clock in the evenings on week days and all day on Sundays serve to discourage patronage on the Branch.

Future Public Convenience and Necessity

The Yonkers Branch carries the inherent germ of a successful inter-urban express service that needs but vision, energy, co-operation and sincerity of purpose to bear fruit for the future.

With reasonable co-operation between the applicant and the Administration of the City of New York, the Yonkers Branch can be developed into an attractive and time-saving mode of travel between downtown New York and the center of Yonkers through the most populous sections of Yonkers that were originally developed around the Yonkers Branch.

Instead of the present slow and clumsy operation of a shuttle between the Lexington Avenue Subway at 167th Street and the Independent Subway at 155th Street, which [fol. 57] requires two transfers by passengers to and from the Yonkers Branch, the southern terminal of the Putnam division may be extended to 161st Street where the lines of both the above subways intersect and where each now maintain a station (Exhibit 1). There, by a system of elevators between the levels there can be established a transfer point where direct subway connections to lower

Manhattan and Brooklyn on the Lexington Avenue line of the I. R. T. and on the Sixth and Eighth Avenue lines of the Independent Subway may be had from a high-speed inter-urban electric line (Yonkers Branch) on which a moderate fare could be charged. This terminus would also serve passengers to and from the main line of the Putnam division.

At the next station south on the Lexington Avenue Subway (149th Street) direct transfer to the Broadway-Seventh Avenue subway is already in operation. Thus the Yonkers Branch would have ideal connection with the *whole* New York City subway system and present congestion at Grand Central Terminal subway station would be relieved.

Under such an arrangement it would not be necessary to maintain a bridge over the Harlem River at Sedgwick Avenue and that impediment to navigation could be removed.

Thus facility of connection with the New York City rapid transit system would be restored comparable to that existing when the Sixth and Ninth Avenue Elevated lines were in operation in 1926 and when the applicant operated 71 trains daily on the Yonkers Branch and an unstated number on Sundays.

With such an efficient and up-to-date method of interchange of traffic so feasible and so clearly to the advantage of all concerned, it would be a manifest injustice to scrap the Branch and to compel the commuting public now using it to patronize the Hudson division at much inconvenience, added expense and loss of time as the only alternative to the use of the surface trolley to the subway with added inconvenience and loss of time in making transfers and waiting for cars, to make night and morning journeys of some 14 to 20 miles to and from mid-town and downtown New York City. It would be clearly unreasonable to [fol. 58] require business people to travel such distances daily to and from their employment by trolley and subway in this age of efficiency and rapid transit, particularly when existing rail transportation has not been fully exploited.

Bus service in the present gasoline and rubber crisis would be inadequate to carry any added traffic to and from the Hudson division.

Careful consideration should be given to the circumstances that the Yonkers Branch constitutes a safety valve for future commuter expansion on the Hudson division.

The applicant's Hudson River division serves the commuting public north of Yonkers.

Its trackage into Grand Central Terminal is now being operated to capacity and will not allow of any increase in the number of trains (Tr. pp. 56, 57, 120) during commuter traffic periods.

Hence, it is essential to provide for some relief of commuter traffic on the Hudson division—which also carries the long distance traffic to the north and west—when commuter traffic north of Yonkers expands it as may be reasonably expected to do in the post-war reconstruction period.

It is therefore extremely important that the Yonkers Branch be maintained intact and in operation to draw off the commuter traffic from Yonkers South and thus permit commuter development to the North without congestion.

In fact, there is no other method available to relieve future congestion on the Hudson division than to make use of the Yonkers Branch with a terminal point in the Bronx as above outlined where passengers may transfer direct to the City Rapid Transit System.

It is preposterous to imagine that a suburban express electric line with direct connection to the New York Rapid Transit System cannot be made a financial success with a reasonable amount of ingenuity, perseverance and salesmanship. It has certainly been done in the case of Philadelphia by the Philadelphia & Western Railway Co.

[fol. 59] To permit the applicant now to abandon the Yonkers Branch without any showing that it has used reasonable diligence to make it pay would be to put a premium upon inefficient railroading with an ulterior motive—that of forcing traffic to another of applicant's lines (Hudson Div.) so as to obtain practically the same revenue with the elimination of taxes and small maintenance costs.

When the Yonkers Branch was constructed in 1888 it was a competitor of the system now operated by the applicant. That competition was first eliminated by a lease in 1894 and later by a merger in 1913. It seems strange that a system (Putnam Division) that has continued to operate since 1888 in an area that has ever since been in course of development and where the saturation point has not yet even been approached, should now be abandoned although

it is even now showing a material percentage of increase in traffic.

If the abandonment of the Yonkers Branch were to be now permitted it would probably not be long before an application would be made to scrap the rest of the Putnam Division. Thus are competitive roads disposed of that would be annoying in the hands of a far-sighted and energetic management.

.

The alleged operating deficit has not been shown to be substantial enough to affect any of the applicant's interstate traffic or service.

Unless the continued operation of the Branch—which is wholly within the State of New York—would burden or cripple the main-line and thereby affect its utility or service as an artery of interstate and foreign commerce the Commission is without authority to grant the order requested by the applicant.

State of Texas v. Eastern Texas R. R. Co., et al., 258
U. S. 204, 218.

Requested Findings of Fact

Protestant respectfully requests that the Commission find the following facts in addition to the corrections of the report as hereinbefore pointed out:

1. The applicant has failed to exercise reasonable diligence to attract passenger traffic to the Yonkers Branch.

[fol. 60] 2. The applicant has failed to exercise reasonable diligence to secure a reduction in the taxes chargeable against said Branch.

3. The Branch may be made financially productive when efficiently correlated with the New York City rapid transit system.

4. The future increase of traffic upon the applicant's Hudson division will require other express traffic facilities to accommodate the commuting population of Yonkers and of way stations nearer New York City.

5. Abandonment of the Branch during the present emergency would impede the war effort and would adversely

affect the morale of a large number of commuters now using the Branch.

6. A further investigation of transportation and traffic conditions in Yonkers and on the Branch should be made before this application is acted upon to provide more recent data to assist the Commission in reaching a just conclusion thereon.

7. The alleged deficit in the operation of the Branch is too insignificant to constitute a burden upon interstate and foreign commerce at the present time.

8. Traffic upon the Branch is increasing materially.

9. The bus service available in Yonkers would be inadequate to accommodate a large proportion of the traffic now served by the Branch.

Conclusion

Upon this record the application should be denied without prejudice or, if not denied, a further investigation of transportation conditions in Yonkers and of costs of operation should be made before further consideration of the application.

Respectfully submitted, Horace M. Gray, Counsel
for Protestant, Committee of Yonkers Commuters.

[fol. 61] EXHIBIT "F" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13914

In the Matter of the Application of The New York Central Railroad Company under paragraphs (18) to (20), inclusive, of Section 1 of the Interstate Commerce Act for a Certificate that the Present and Future Public Convenience and Necessity Permit of the Abandonment by The New York Central Railroad Company of a Line of Railroad between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York

Exceptions of the Public Service Commission of the State of New York to Report Proposed by Lucian Jordan, Examiner

The Public Service Commission of the State of New York excepts to the conclusion of the Examiner set forth on sheets 5 and 6 of the proposed report as follows:

"It is apparent from the records that the branch is being operated at considerable loss to the applicant, and that its abandonment would not result in serious inconvenience to the public. Its continued operation would impose an undue burden upon the applicant and upon interstate commerce and is not warranted.

It is recommended that division 4 find that the present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of the branch line of railroad in Bronx and Westchester Counties, N. Y., described herein. An appropriate certificate should be issued."

[fol. 62] on the ground that insufficient weight was given to existing conditions, to limitations imposed by the Office of Defense Transportation on motor bus operation and to the difficulty of obtaining adequate facilities to serve the commuters through the use of additional buses.

Point I

The Petitioner Has Failed to Show that the Continued Operation of This Line Places Any Real Burden on Interstate or Intrastate Commerce

As shown by Exhibit 4 (condensed income account for the years 1937-1941 and for the five months ended May 31, 1942) the net income of the New York Central Railroad Company has been steadily and progressively increasing since 1938 and commuter traffic on the branch has increased 2.87 per cent in the past year (Examiner report, p. 5).

The "considerable loss" (line 51, sheet 5) to which the Examiner refers is \$56,941 as shown at line 41, sheet 4. The Examiner has failed to appreciate that this is not a real loss of that amount since it would be offset by at least 40 per cent because of savings in income taxes. The effect of the continued operation of this branch on the national transportation system would be so insignificant as not to merit serious consideration.

Point II

The Examiner Failed to Give Consideration to the Needs of the Traveling Public and to the Office of Defense Transportation Requirement Ordering a Reduction of 15 Per Cent in Bus Transportation.

Although the Examiner has recognized that the bus routes between the Hudson and Yonkers lines of the New York Central Railroad Company now carry standing passengers during the rush hours (sheet 3) he has failed to give consideration to the testimony that shows that three morning trains between 7:33 and 8:07 have been carrying 366 passengers (Tr. p. 128). It is obvious that two additional buses could not possibly transport these additional passengers during the half hour period in the morning rush. Obviously the same situation exists in the evening rush hours.

[fol. 63] The Examiner has further disregarded the Office of Defense Transportation requirement that motor bus transportation in the State of New York and elsewhere be reduced 15 per cent (Tr. p. 137). It is common knowledge that expansion of bus transportation is being restricted so that the war effort may be successfully prosecuted.

Mr. Jack Pansky, the president of the bus company, who was called as a witness by the petitioner, testified that he has given considerable thought as to — he would comply with the Office of Defense Transportation requirements to reduce transportation by 15 per cent but he has no such plan (Tr. p. 137).

He further testified as follows:

By Mr. McVay:

Q. Mr. Pansky, how long have you been in the transportation business?

A. About 20 years.

Q. Do you expect to make a profit on each and every operation that you conduct?

A. No, sir.

Q. And you are operating branch lines, are you not, on which you don't make the cost of operation?

A. That is true.

Q. How much has your business increased during the past year?

A. About 16 percent, I would say, roughly.

Q. And it is still increasing; is it not?

A. Yes.

That the petitioner did not feel that bus operation by the Club Transportation Company was a substitute for its service is shown by the fact that it did not oppose the bus operator's applications for certificates of convenience and necessity. (Tr. p. 136).

Mr. Pansky in describing the section served by the branch line testified as follows (Tr. p. 134):

[fol. 64] "Q. Will you describe that section, beginning with South Broadway and going toward the east? What is the layout of the land in that section?

A. It is quite hilly, I would say, and it is mostly residential, private homes.

Q. And from South Broadway up to the Getty Square Branch of the railroad, it is a considerable height, is it not?

A. Yes, it is.

Q. And then from the railroad it is, up to the top of the Park Hill section, another considerable height?

A. Yes, sir.

Point III

The Report of the Examiner Should Be Disapproved and the Petition Should Be Denied

The courts have consistently held that the loss to the railroad company must clearly outweigh the resulting inconvenience to the public.

Railroad Commission of Texas v. Eastern Texas Railroad Company, 264 U. S. 79.

Colorado v. United States, 271 U. S. 153.

Transit Commission v. United States, 284 U. S. 360.

Interstate Commerce Commission v. Railway Labor Assn., 315 U. S. 357.

At this time of emergency and stress any curtailment of necessary means of rail transportation, particularly where the burden on the railroad is slight, is unwarranted. From the record it definitely appears that some 600 commuters would be required to spend additional time and money in

order to travel over makeshift routes between Yonkers and New York City on transit lines already overcrowded. Against this the railroad would save approximately \$35,000 annually at a time when it is enjoying a sustained period of prosperity. To dismantle a well maintained and well patronized branch line when the public is in dire need of more but unavailable transportation facilities is economically unsound. Rail transportation should be continued whenever possible at this time because such transportation does not consume rubber or gasoline.

[fol. 65] Even if the loss from operating this branch line were more substantial, The New York Central Railroad Company should share somewhat in the sacrifice required of all in war time. The report of the Examiner should be disapproved and the petition denied.

Respectfully submitted, Gay H. Brown, Counsel to
the Public Service Commission, 80 Centre Street,
New York, N. Y.

George E. McVay, of Counsel.

Dated February 12, 1943.

[fol. 66] Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in the above proceedings by mailing by first class mail a copy thereof, properly addressed, to each other party:

George E. McVay.

Dated New York, N. Y., February 13, 1943.

[fol. 67] EXHIBIT "G" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13914

New York Central Railroad Company Abandonment

REPLY TO EXCEPTIONS TO PROPOSED REPORT

Separate exceptions to Examiner Jordan's proposed report have been filed by the Committee of Yonkers Com-

muters, The Public Service Commission of the State of New York and the City of Yonkers. Most of the contentions made by The Public Service Commission and the City of Yonkers are also made by the Committee of Yonkers Commuters. This reply will therefore be directed primarily to the Committee's exceptions.

First Exception

In stating that "The only connection for interchange of traffic is the Main Line of the applicant's Putnam Division at Van Cortlandt Park Junction", the Examiner uses "connection for interchange of traffic" to indicate that the line has no other physical connection with any railroad. The only point where traffic may be interchanged without transfer of lading is Van Cortlandt Park Junction. The Examiner's statement is correct, for after reaching Van Cortlandt Park Junction the line merges with and becomes a part of the Putnam Division. The exception is not well taken.

Second Exception

The Examiner's statement that Caryl is 0.6 mile and Lowerre 0.9 mile from the nearest station on another railroad is entirely accurate and contains no suggestion as to what service is available at such nearest railroad station.

[fol. 68]

Third Exception

The Examiner's statement that the population of the tributary area "is estimated by the applicant at not more than 13,000" is correct. It was estimated at 8,100 on one basis and at 12,834 on another basis (See page 6 of the Return to Questionnaire). Whether the population may in fact be larger is of no particular significance. Throughout the entire day an average of 600 people use the line to go to and from New York, and it makes no difference whether it is 600 out of 13,000 or 600 out of 38,000. In one case 95.4 per cent of the people who are potential users do not use the line, and in other case it is 98.4 per cent.

Fourth Exception

The statement that "Improved alternate methods of transportation between Yonkers and the City of New York

have also tended to take business from the line" is not subject to criticism merely because it does not give in one sentence the entire picture fully presented in other portions of the report.

When constructed in 1888 the line was the only means of rapid transit between New York and southern Yonkers. From time to time new competition, consisting of street cars, subways, bus lines and private transportation via numerous improved highways has taken business from the line. There is no point to quibbling about whether these alternate methods are in fact improved methods. They may not be as comfortable nor as convenient as rail transportation, but for reasons of price, convenience or caprice the public has used them. The public apparently regards the bus route to applicant's Ludlow Station at which point Hudson Division trains can be boarded as an improved method, avoiding as it does the transfer at High Bridge or University Heights. The suggestion that the bus route cannot accommodate additional passengers will be dealt with in our answer to the Seventh Exception.

Fifth Exception

There is no point to the criticism of the Examiner's omission of one route in his statement on sheet 3, lines 1 to 17. [fol. 69] The statement concerns alternate routes which would be available in the event the line was discontinued. The route sought to be included is not an alternate route, but a present route from Sedgwick Avenue, the terminus of the existing line.

Sixth Exception

The point of this exception is not clear. The various maps in evidence all show the trolley line closely paralleling the Youkers Branch throughout its length. The fact that the line is .18 mile away at the Caryl Station and .23 mile away at the Lowerre station tends to prove rather than disprove the parallelism.

Seventh Exception

There is nothing incomplete or misleading in the recital that the President of the Bus company stated that his company could place two extra busses of 25 capacity each

in service to handle additional passengers if the branch is abandoned. The statement was made (Tr. 127).

The force of the statement is not impaired by the mere supposition that the Office of Defense Transportation might not permit the transfer of the two surplus busses to Yonkers. The President of the bus company states that the busses are available and there is every reason to think that his statement was made with due regard to authority and policy of the Office of Defense Transportation.

Protestant says (page 6) "It is ridiculous even to consider whether two 25 passenger busses could accommodate some 600 additional passengers during peak periods." There is no need to consider it for the 600 figures is the average for the day, not for the peak period. The Public Service Commission in its Exception 2 (page 3), on the same point uses the figure 366 for the peak load, taking the total passengers for three morning trains, between 7:33 and 8:07 a. m. This figure is also too high for use in calculating Ludlow bus traffic, because it is entirely unlikely that every Yonkers Branch passenger will attempt to come over to the Hudson Division by bus to Ludlow. Getty Square passengers will walk or take street cars to Yonkers Station, and many Caryl and Lowerre passengers will take the trolley line down Broadway to the subway at 242nd Street rather than come to the Ludlow [fol. 70] station. Even if a large number come to Ludlow, two extra busses in shuttle service over a 1.4 mile route to Caryl, and a 1.1 mile route to Lowerre could accommodate them all.

Eighth Exception

Recognizing that loss from operations is the crux of the case, protestant is obliged to take an exception, however weak or ill-founded, to the Examiner's figure of \$56,941 for annual operating loss. The exception claims that the statement of operating loss, though based upon undisputed figures of record, is confusing and incomplete, but instead of clarifying the situation or giving a complete figure protestant deducts railway tax accruals of \$34,557, suggesting that efforts, "*bona fide* efforts" is the phrase, should have been made by applicant to have its taxes reduced. Even such an unheard of reduction as 50 per cent within Yonkers would save only \$11,000 or \$12,000 a year (Tr. 112). It is significant that the City of Yonkers exceptions

make no suggestion about drastic tax reduction. The other tax recipient, the City of New York, favors the abandonment and would not reduce taxes to keep the line in operation.

The figure of \$56,941 for annual loss is conservative. It assumes a complete loss to the applicant of all the patronage of the Branch, though even the protestant expects a substantial number to take the bus to Ludlow and use Hudson Division service (See Seventh Exception); it gives the line credit for all system revenue earned beyond the line, which revenue is three times the line revenue; it includes no expense of operation incurred beyond the line except estimated out-of-pocket cost of moving traffic between Van Cortlandt Park Junction and Sedgwick Avenue, which leaves nothing for transporting 193,745 transfer passengers (sheet 4, line 23) to and from Grand Central on Hudson Division trains; it provides nothing for superintendence or overhead; it assumes maintenance cost for way and structures of \$16,400 per year, based on lean year averages, though the actual 1941 expense was \$23,817, and deferred maintenance has been considerable (Tr. 44-46); it provides no return on salvage value, not to mention invested capital; [fol. 71] and takes no account of the value of the eleven multiple unit cars now held captive on the line that could be used with profit elsewhere.

An out-of-pocket loss of at least \$56,941, as stated by the Examiner, cannot be controverted. But, says the protestant, page 7, when "compared with net income of \$26,245,562 for 1941 * * * it is difficult to imagine that the Yonkers Branch could 'cripple' applicant's main line or affect its utility or service as an artery of interstate and foreign commerce." However, many decisions of the Commission permit properous lines to abandon unproductive mileage in order to promote an efficient national transportation system. Were it otherwise a railroad could not long remain prosperous or efficient.

Ninth Exception

The point or purpose of this exception is not clear. There is nothing inaccurate or misleading in the cited statement. It gives the increase in commutation on the Hudson and Harlem Divisions as compared with the increase on the

Yonkers Branch. The revenue for each branch is separately computed. Commuter traffic originating or terminating on the Yonkers Branch is credited to that branch even though Hudson Division trains may be used to the transfer point.

The significance of the comparison is that the Yonkers Branch is losing ground. If other lines show a 12 per cent increase in commutation while the Yonkers Branch shows an increase of less than 3 per cent, it indicates that even the ~~existence of unusually favorable conditions~~ will not revive the line. Local bus traffic has increased 13 per cent, street car traffic 25 per cent, commutation traffic on applicant's other lines 12 per cent, and yet commutation on this line increased less than 3 per cent. There is no present public necessity for the line even if the increase be larger, and obviously there is no future necessity for a line that cannot hold its own now.

Tenth Exception

In view of protestant's failure to impeach any of the revenue or expense figures, an exception to the inevitable [fol. 72] result of those figures is unavailing. The fact is that the line is being operated at an annual out-of-pocket loss of at least \$56,941, which is a considerable loss. The five points set forth on page 9 in alleged support of the exception do not support it.

It is asserted first that it does not appear that the applicant has used reasonable diligence to reduce the cost of operation, but there is no suggestion, not to say proof, as to how cost of operation could be reduced. Wages are standard, full crew laws apply, taxes are fixed, reasonable maintenance is necessary, and a day of reckoning on deferred maintenance is inevitable.

The second assertion is that the applicant has discouraged use of the Branch to divert traffic to its Hudson Division. This is entirely imaginary. The heavy expense of electrifying the Yonkers Branch in 1926 was made to encourage Branch patronage. The fact that a bus route through the territory pulled patronage to the Hudson Division is a tribute to the superiority of the Hudson Division service, offering, as it does, with its greater volume, more frequent service and avoiding especially the inconvenient

transfer at High Bridge which Branch passengers must make to reach Grand Central.

The third assertion that the line is susceptible of development as a remunerative, independent, interurban line for express passenger traffic is unsupported. The only testimony on this point (Tr. 205-214) was from a self-styled expert with correspondence school experience who was 20 years old, but upon whose testimony the protestant does not appear to rely.

The fourth assertion is absurd. It would discount loss on the Yonkers Branch because it does not affirmatively appear that the total revenue derived from Yonkers traffic on the three lines operated by the applicant in Yonkers territory is less than the combined expense of operation of such lines. The Branch, must, obviously, stand on its own earnings or fall on its lack of them, and other lines had nothing to do with the case.

The fifth assertion, and the last under this exception, is [fol. 73] that there should be no abandonment while the traffic curve is rising and no heavy capital outlay is imminent. The rise in traffic would have to be phenomenal to do any good. The lack of heavy capital outlay in the near future does not nullify substantial annual loss. Moreover, the salvageable rails, and particularly the cars, can be put to better use elsewhere, and the scrap metal is urgently needed for war production.

Eleventh Exception

This exception is to the Examiner's conclusion that abandonment of the Branch would not result in serious inconvenience to the public. The protestant's assertion that it would be a serious inconvenience to the public is based upon a misconception as to the class of people who constitute the "public" in the phrase "public convenience and necessity" as used in Paragraph 18 of Section 1 of the Interstate Commerce Act. It does not mean the particular and limited part of the public who use the line, for the abandonment of any line would be an inconvenience to that group. The public referred to must necessarily be a larger group. One such larger group would be the 38,000 people (Third Exception) owning property worth \$27,901,250 (Tr. 149) in the territory alleged to be tributary to the line. The line could hardly be called a necessity to this public since it is

unused each day at 98.4 per cent of them. The public convenience of an even larger group, the passenger traveling public served by the New York Central, would be best served by abandonment of the Yonkers Branch, for abandonment would release eleven multiple unit cars for use on the Harlem Division, thereby releasing for general passenger service an equal number of the regular passenger coaches being used on Trains 450 and 474 (Tr. 20). A still wider public, the entire public served by the New York Central—the public the statute refers to—would be served by permitting the abandonment, for it would promote the maintenance of an adequate and efficient transportation system by the New York Central.

Twelfth Exception

Exception is taken to the conclusion, inevitably, following [fol. 74] from the facts that continued operation would impose an undue burden upon the applicant and upon interstate commerce and is not warranted. Three assertions, somewhat repetitious of previous claims are made in support of the exception.

The fifth assertion, like that made in the Eighth Exception, page 7, is that continuance of the burden would not cripple applicant's main line or affect its utility or service as an artery in interstate and foreign commerce. The statute under which this proceeding was instituted makes the standard whether public convenience and necessity permit abandonment, not whether continued operation would cripple the applicant. A carrier may not be required to continue indefinitely the operation of a branch line which will not pay the cost of operation maintenance, and taxes on the theory that its system on the whole is profitable.

The second assertion that applicant's other lines would enjoy no better rates or better service if and when the Yonkers Branch is abandoned overlooks entirely the grave need elsewhere for the eleven multiple unit cars now inefficiently used on the Yonkers Branch. The standard equipment released from service on the Harlem Division would make a full train of day coaches which could be used anywhere for transportation of soldiers or civilians. The necessity for additional cars in that service needs no elaboration here.

The third and last assertion under this exception is that continued operation, upon a *bona fide* effort to develop traf-

fic, would be reasonably profitable. Claims like these, even when supported by testimony, are immaterial. In a case of this kind we must deal with facts, not accusations and suppositions.

Thirteenth Exception

The final exception is to the conclusion that the present and future public convenience and necessity permit the abandonment. Five assertions are made under this exception in somewhat the same manner as in the previous exception, repeating some of the prior arguments.

It is a sufficient answer to the first four points dealing [fol. 75] with the effect of the abandonment on the community to repeat the familiar rule that no community is entitled to retain a transportation agency it does not support. The community has made its choice by withdrawing its patronage and cannot be heard to complain when the result of that choice is abandonment of the line.

The fifth and last assertion is new in this proceeding. It is that the Yonkers Branch should be retained to relieve the Hudson Division, to provide a safety valve for future commutation expansion on that division. The point is elaborated upon on pages 17 and 18. This far-fetched idea probably germinated out of a misconception of testimony on pages 56, 57 and 120 of the transcript (see page 17 of the exceptions) concerning the capacity use of tracks to Grand Central during rush hours. The testimony referred to the difficulty of putting additional trains into Grand Central during that period. It does not mean that additional cars may not be added to present trains and contains not the slightest suggestion of present or future inability to accommodate Hudson Division patronage. There is therefore, no basis whatever for concern about the ability of the Hudson Division to handle all commuters likely to use the line. Even if there was, the cars off the Yonkers Branch could more efficiently be used directly in that service, especially when it is realized that passengers from the Yonkers Branch who transfer to or from Hudson Division trains at University Heights or High Bridge need to have a duplicate seat provided for them on Hudson Division trains.

Reply to Argument

The matter contained under the heading "Argument" beginning on page 13 of the exceptions of the Committee of Yonkers Commuters is largely repetitious of what is in the exceptions. It is made up of derogatory statements about past managerial policies and irresponsible theorizing about how the Branch could be run with profit in the future. It would appear that the pre-requisites for financial success of the line are "a reasonable amount of ingenuity, perseverance and salesmanship" (p. 18), "a *bona fide* effort to develop traffic" (p. 11), "reasonable co-operation between the applicant and the Administration of the City of New [fol. 76] York" (p. 15), and "energetic management" (p. 19).

The scheme for making a future profit, instead of putting "a premium upon inefficient railroading with an ulterior motive" (p. 18), requires the overhead extension of the southern terminus of the line a quarter of a mile or more within New York City at an unnamed cost for construction and damages to a new connection with city subways; the installation of a system of elevators between the levels; and doubtless a new station to accommodate the crowds of people. Of course, there is to be reduction in the fare, euphemistically referred to as a "moderate fare" (p. 15), to make the new service attractive.

This particular excursion into the realm of railroad management and financing is entirely beyond the scope of the record and was not suggested by any witness. The fact that it is made by able counsel in these exceptions is the best proof that the line should be abandoned. If patronage can be obtained only by a large outlay of capital on a speculative scheme involving a reduction in fare, it is evident that the existing line no longer serves a useful purpose and should be abandoned.

In conclusion it should be noted that the abandonment of this line will release 65,000 lineal feet of rail weighing 1,162 gross tons, 39,600 tie plates, together with almost 1,000 tons of bridge material and other miscellaneous scrap which is sorely needed for war production, and, most important of all, will permit the release of eleven standard passenger cars now being used on the Harlem Division, cars that can carry both soldiers and civilians anywhere in the United States in the present emergency. Such cars can no

longer be built. They are too precious to be tied up on a line that is operating at a loss to provide service to a community which has alternate means of service the vast majority prefer to use.

The people who now use the line are not being deprived of their sole means of transportation as in many abandonment cases. They may still get to their places of employment by means of transportation which many communities [fol. 77] in these days would consider adequate.

Respectfully submitted, Thomas P. Healy, H. H. McLean, Counsel. 466 Lexington Avenue, New York, N. Y.

February 20, 1943.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in the above proceedings by mailing by first class mail a copy thereof, properly addressed, to each other party.

Dated at New York, N. Y., this 20th day of February, 1943.

H. H. McLean.

[fol. 78]

EXHIBIT "I" TO COMPLAINT

Interstate Commerce Commission

Finance Docket No. 13914

New York Central Railroad Company Abandonment

Submitted March 3, 1943. Decided March 20, 1943.

Certificate issued permitting abandonment by the New York Central Railroad Company of a branch line of railroad in Bronx and Westchester Counties, N. Y.

Harold H. McLean for applicant

George E. McVay for the Public Service Commission of New York.

Harry Hertzoff for the City of New York

Leonard G. McAneny, Harold T. Garrity, Horace M. Gray, Paul L. Bleakley, and J. G. Luhrsén for protestants.

Report of the Commission

- Division 4, Commissioners Porter, Mahaffie, and Miller.

By Division 4:

Exceptions to the report proposed by the examiner were filed, and the case has been argued orally:

The New York Central Railroad Company on August 20, 1942, applied for permission to abandon its so-called Yonkers branch extending from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, approximately 3.1 miles, in Bronx and Westchester Counties, N. Y. Protests were filed and a hearing was held, at which the Public Service Commission of the State of New York was represented by counsel in opposition to the application. All points mentioned herein are in New York.

Construction of the Yonkers branch was completed in 1888 by the New York & Northern Railway Company. After several changes in ownership and operation it was acquired through merger by the New York Central & Hudson River Railroad Company, predecessor of the applicant, in 1913. The only connection for the interchange of traffic is with the main line of the applicant's Putnam division at Van Cortlandt Park Junction. The main line extends southerly from that point through University Heights and High Bridge to its terminal at Sedgwick Avenue, near the Harlem River, between 161st and 165th Street. These lines are electrified.

The stations on the line, with their distances in miles from Sedgwick Avenue and from the nearest station on another railroad, in that order, are Caryl, 6.15, 0.6; Lowerre, 6.52, 0.9; Park Hill, 7.11, 0.6; and Getty Square, 7.79, 0.3. The tributary territory, with boundaries midway between the branch and other lines of railroad, is 1.2 square miles in area, or 5.7 percent of the City of Yonkers. Its population is estimated by the applicant at not more than 13,000, based on the number of voters in the Eighth Ward, which covers approximately the same area. No industries are dependent on the line for service.

[fol. 79] No freight is handled on the branch. Passenger service is rendered daily except Sunday by 17 trains making round trips between Getty Square and Sedgwick Avenue. Of these 17 trains, 12 are 2-car, four are 3-car, and

one is a 4 car operation. There has been no change in the number of scheduled trains or cars operated since the fall of 1938. Prior to that time several reductions had been made from time to time in the number of trips operated, because of the gradual reduction of the number of passengers using the line. In 1926, when the branch was electrified, 71 trains were operated on week days. It was anticipated that the change to electric power would result in increased patronage, but the number of passengers carried since that time has declined materially. The abandonment of the Sixth Avenue and Ninth Avenue elevated lines in December 1938 and June 1940, respectively, contributed to the reduction in patronage of the branch. These lines formerly furnished service from Sedgwick Avenue to downtown New York. Improved alternative methods of transportation between Yonkers and New York have also tended to take business from the line.

The Yonkers branch is paralleled generally on the east by the applicant's Putnam division, with which it connects, and on the west side by the so-called Hudson division, leading to the Grand Central Station in New York City. Most of the patrons of the branch travel regularly between Yonkers and the Grand Central station. The applicant has another line, the Harlem division, paralleling the Putnam line on the east, and extending from points north of Yonkers to a connection with the Hudson division south of Sedgwick Avenue, near 149th Street. The Hudson line has four stations within the City of Yonkers; namely, Ludlow, Yonkers, Glenwood, and Greystone. The stations on the Putnam main line, within Yonkers, are Lincoln, Dunwoodie, Bryn Mawr, Nepperhan, Gray Oaks, and Nepara Park. There are also five stations on the Harlem line just east of Yonkers; namely, Wakefield, Mt. Vernon, Fleetwood, Bronxville, and Tuckahoe. A bus line operates regularly between points on the Hudson line and Caryl, and another operates between that line and a point within half a block of Lowerre. A trolley line extends from Getty Square southerly to a connection with the Broadway subway at 242nd Street. Another trolley line extends from a point about midway between Lowerre and Park Hill to Lincoln, and affords connection with a subway line leading into New York.

A witness for the applicant testified that under the present schedules the time required for travel between Lowerre

and the Grand Central Terminal, including the transfer to the Hudson line at High Bridge, averages 40.2 minutes, and the average cost on the basis of a monthly commutation ticket is 16 cents one way. He stated that the most feasible alternative is by bus from Lowerre to Ludlow on the Hudson line, at which point the train is available to the Grand Central. That route requires 42.4 minutes and costs 22 cents, or 6 cents more than the present travel over the branch. Travel by the Broadway trolley from a point 0.18 mile from Lowerre to 242nd Street, the subway to Marble Hill at 225th Street, and the Hudson division train from that point to the Grand Central, is said to require 50.1 minutes and to cost 23.9 cents. A fourth method was described as follows: Broadway trolley to 242nd Street, the Broadway subway to Times Square, then the shuttle to Grand Central Terminal, total time 57 minutes, and the cost 10 cents. The trip to Times Square may be made under the present arrangement by using the Yonkers branch to Sedgwick Avenue, the shuttle to 155th Street; the Eighth Avenue subway to 42nd Street, and a 5-minute walk to Times Square. This would involve a total of 45 minutes and cost 15.6 cents.

The superintendent of the company operating the Broadway trolley lines testified that two of his lines are operated through Getty Square. They converge near Park Hill and extend south on Broadway to 242nd Street, where the sub-[fol. 80] way may be entered. The trolley line closely parallels the Yonkers branch throughout its length. The company operates 55 cars and has five in reserve. The record shows that the traffic on the trolley line is light, and that substantially more passengers could be carried without difficulty. The witness expressed the view that if the branch is abandoned the trolley line will be able to handle the expected increase in business.

The president of the bus company which operates two bus routes between points on the Hudson and Yonkers lines testified that his company could place two extra busses of 25 capacity each in service to handle additional passengers if the branch is abandoned. There has been an increase of about 15 percent in the number of passengers handled during the past year, and during the rush hours the busses have some standing passengers. It is his opinion, however, that by adding two units of equipment the

busses could handle the increased business resulting from the proposed abandonment. The bus fare is five cents.

Most of the witnesses testifying in opposition to the application are residents of Yonkers who use the line regularly in travel to and from many locations in New York City. Various alternative methods of travel have been tried by the witnesses. The record shows that the Yonkers branch affords better service than the other routes used. In most cases the alternative routes required from 10 to 25 minutes more time, and in some instances, depending upon the method of travel used, the excess time was an hour or more. Some of the travelers had not tried certain routes suggested by the applicant as being reasonably convenient.

The Director of Civilian Protection for Yonkers urges that the line be retained for use in case of enemy air raids or similar emergencies. It is his opinion that convenient use could be made of the branch in evacuating people from the city or bringing in needed supplies. The record shows that in case of extensive evacuation the movement would be to the north of Yonkers, whereas the line extends southerly to the connection with the Putnam line. The latter extends to points north of Yonkers.

The Deputy Tax Commissioner of Yonkers expressed the view that the area tributary to the branch is somewhat more extensive than that assigned by the applicant, and that the population thereof was 38,204 in 1940. The assessed value of the land and improvements of the area is \$27,901,250. A real estate broker of Yonkers testified that in his opinion that valuation would be decreased approximately 10 percent if the line is abandoned.

Passengers carried on the branch during the years 1940-41 and the first six months of 1942 are shown, in order, as local 7,134, 7,127, 3,735; interline, (a) intermediate points on the Putnam division 23,350, 33,922, 19,833; (b) Sedgwick Avenue 116,680, 70,169, 36,674, (c) University Heights and High Bridge transfers 193,745, 188,987, 101,359; totals 335,909, 300,205, 161,601. Financial statements submitted by the applicant, for the purpose of showing the effect of the proposed abandonment upon the applicant's revenues, set forth the following: System revenues from traffic handled on the branch during each of the years 1940-41 and the first six months of 1942, in order, including negligible amounts from vending machines, \$49,603, \$45,438, \$24,494, of which \$11,886, \$10,725, and \$6,000 have been assigned to

the branch on a mileage basis. The estimated annual expense of operating the branch, based on the records of expenditures for the years 1934-37 and 1940-41 and the first three months of 1942, is shown as \$41,558. The cost of moving the traffic of the line over other parts of the [fol. 81] system is shown as \$30,517, railway tax accruals, \$34,557, and miscellaneous rents, credit, \$2,140. These figures indicate that the estimated annual loss from operation of the branch is \$56,941, on the basis of the average revenues for the years 1940 and 1941, including rents and the small amounts of income from vending machines.

In determining the income, the branch has been credited with all revenues earned on the haul of the passengers between points on the branch and points of destination in New York City. No expense of operation incurred beyond the line has been included except the estimated out-of-pocket cost of moving the traffic between Var Courtlandt Park Junction and Sedgwick Avenue. This amount will be saved if the line is abandoned. The principal items of operating expenses on the branch are shown as maintenance of way and structures \$16,400, maintenance of equipment \$2,940, train-crew wages \$7,982, station employees \$7,862, and cost of electric power \$3,554. Station employees' expenses are actual. The other expenses are estimated on the basis of the usual costs for such items under normal conditions of operation. The actual cost of maintenance of way and structures for 1940 was \$16,286. The cost for 1941 was \$23,817, including \$900 in connection with stations and office buildings, considered as being in excess of the annual normal expenditures for such items. The amount shown for taxes is based on the 1942 tax rates and assessed valuation of the land and improvements of the branch, less the small amount of taxes paid by lessees.

While the line proposed to be abandoned is only 3.1 miles in length, the train operations to be discontinued extend from Getty Square to Sedgwick Avenue, approximately 7.8 miles. Trains will continue to be operated over the Putnam line between the end of the branch and points in New York City. The proposed abandonment, however, would enable the applicant to salvage a considerable quantity of transmission and signal materials from the segment beyond the branch to Sedgwick Avenue. The record shows that the line is difficult to maintain because it is located along hill-sides and crosses nine city streets overhead by means of

bridges and viaducts. Another bridge carries a street over the railroad. The line is double track, laid throughout with treated ties and ballasted with cinders. About 80 percent of the rail is 105-pound and the remainder is 100-pound. The track has been maintained sufficiently to insure safe operation, but the applicant represents that maintenance has been deferred to some extent, particularly with respect to ties and ballast.

The estimated net salvage value of the materials to be recovered if the application is granted is \$53,823, and the value of the land used is \$11,000. The abandonment would also release for use on other lines 11 units of electric equipment, valued at \$235,000. It is proposed to transfer this equipment to the Harlem division, which is powered by electricity. In turn certain coaches used on the latter line, which are suitable for use in trains operated by steam, will be released for service on other parts of the system.

The record shows that the total business of the Yonkers branch is only about 25 percent of the volume of 12 years ago. While the commuter traffic on the Hudson and Harlem divisions has increased approximately 12 percent during the past year, that of the branch has increased only 2.87 percent, and there is nothing to indicate that any substantial increase will be experienced in the future.

Counsel for the protestants requested, upon oral argument, that a further hearing be held for the purpose of securing testimony concerning possible extension of a subway line by the City of New York. It is his understanding that the city proposes to extend the Lenox Avenue line from a point near West 145th Street to a connection with the shuttle near 155th Street. It is said that this additional service would supply the same kind of transportation as that formerly afforded by the 6th and 9th Avenue elevated lines which have been dismantled. It is represented that the project will be started after the end of the war. Counsel for the City of New York stated, however, that in his opinion the City will not build the extension. In the circumstances it is not deemed probable that any useful purpose would be served by a further hearing.

Counsel requests also, that if the application is granted, we make the effective date thereof not less than 60 days from the date of our report. The purpose of the suggested delay is to give the City of Yonkers an opportunity to

reduce the taxes on the branch to encourage its continued operation. There is nothing of record to indicate that any such reduction will be made.

A representative of the Railway Labor Executives' Association requests that we reserve jurisdiction to consider the question of imposing conditions for the protection of employees who may have been adversely affected by anything done pursuant to the permission to abandon. Our certificate will be issued upon the understanding that we retain such jurisdiction for a period of two years from the date hereof.

It is apparent from the record that the line in question is being operated at a substantial loss to the applicant, and that there is no prospect of more favorable results for the future. Continued operation would impose an undue and unnecessary burden upon the applicant and upon interstate commerce.

We find that present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of the line of railroad in Bronx and Westchester Counties, N. Y., described herein. An appropriate certificate will be issued, effective from and after 40 days from its date, in which suitable provision will be made for the cancellation of tariffs.

[fol. 83]

EXHIBIT "J" TO COMPLAINT

Certificate of Public Convenience and Necessity

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 20th day of March, A. D. 1943

Finance Docket No. 13914

New York Central Railroad Company Abandonment

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit abandonment by the New

York Central Railroad Company of the branch line of railroad in Bronx and Westchester Counties, N. Y., described in the aforesaid report, *Provided, however*, and this certificate is issued upon the express understanding, that the Interstate Commerce Commission reserves jurisdiction for a period of two years from the date hereof to consider the question of whether conditions should be imposed for the protection of employees who may have been adversely affected by anything done pursuant to the permission to abandon granted herein.

It is ordered, That this certificate shall take effect and be in force from and after 40 days from its date. Tariffs applicable to the line in question may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It Is Further Ordered, That the New York Central Railroad Company, when filing schedules canceling such tariffs, shall in such schedules refer to this certificate by title, date and docket number.

And it is further ordered, That the New York Central Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 84] EXHIBIT "K" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION.

Docket No. FD-13914

In the Matter of the application of the New York Central Railroad Company for a certificate of public convenience and necessity permitting abandonment of the line of railroad extending from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers.

That the City of Yonkers, the protestant herein, respectfully petitions the Commission:

(1) To grant a rehearing therein as to the matters determined by its certificate and order by Division 4 of the

Commission dated March 20th, 1943, authorizing the abandonment of part of The New York Central Railroad Company's line of railroad running from Sedgwick Avenue, New York City, County of Bronx, and Getty Square, City of Yonkers, County of Westchester, viz: that part of the said line running between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, City of Yonkers, in the County of Westchester.

(2) For the entry of an order staying the effective date of said certificate and order and staying the New York Central Railroad Company from acting under said certificate and order and abandoning part of said line of railroad until the ultimate determination of this application.

(3) For a review, rehearing, reconsideration and reargument on the ground that the said Commission erroneously decided that this application for the said abandonment should be granted, although it had no jurisdiction to grant such relief, and upon all other grounds set forth below.

That a history of this proceeding up to date is briefly stated as follows:

That the above entitled proceeding was instituted by the application of the New York Central Railroad Company under paragraphs (18) to (20), inclusive, of Section 1 of the Interstate Commerce Act for a certificate that the present and future public convenience and necessity permit of the abandonment by the New York Central Railroad Company of a line of railroad between Van Cortlandt Park [fol. 85] Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York.

That the line proposed to be abandoned is part of that branch or line running from Getty Square, Yonkers, to Sedgwick Avenue, New York City.

That the City of Yonkers appeared at a hearing on this application held in City Hall, Yonkers, New York, on November 12th, 1942, as a protestant against such application and as such protestant opposed the said application.

That thereafter and on or about February 8th, 1943, there was filed a proposed report by Lucian Jordan, Examiner, in which said proposed report he recommended that the application of the New York Central Railroad Company for the abandonment of said line should be granted.

That thereafter and on or about the 13th day of February, 1943, the City of Yonkers, New York, as a protestant excepted to the report and order proposed by said Examiner Jordan, which exceptions were duly filed.

That thereafter a hearing was held by the Interstate Commerce Commission, Division 4, at its office in Washington, D. C. on the 3rd day of March, 1943, on which date the oral argument was heard in relation to said application.

That on or about the 20th day of March, A. D. 1943 the said Interstate Commerce Commission, Division 4, consisting of Commissioners Porter, Mahaffie and Miller, filed a report and issued a certificate and order directing the abandonment of part of said line, and further ordered in said certificate or order that it should take effect and be in force from and after forty days from the date of said order or certificate.

In support of said petition, your petitioner respectfully shows:

1. *That the continuation of said part of line will not be an undue burden on interstate commerce.*

That the proposed report of Lucian Jordan, Examiner for the Commission, which was confirmed by the Commission in its order dated March 20th, 1943, contains this proposed finding on Sheet 5 of said report, lines 53-55, inclusive:

[fol. 86] "Continued operation would impose an undue and unnecessary burden upon the applicant and upon interstate commerce". (Italics ours.)

That the applicant in its Return to Questionnaire dated August 19th, 1942 included therein Exhibits designated in said Return to Questionnaire as Exhibits 3 and 4. That said Exhibit No. 3 shows a condensed general balance sheet of the New York Central Railroad Company as of May 31st, 1942. That said Exhibit No. 4 shows the condensed income account of the New York Central Railroad Company for the years 1937-1941 and for five months ended May 31st, 1942.

That according to this said Exhibit No. 4, the only year the applicant had a deficit was in the year 1938. That according to this exhibit, for the first five months in the year 1942 up to May 31st of that year, the net income was \$11,377,125. That the said exhibit does not contain the

full income account for the year 1942. That, therefore, it necessarily follows that it does not give a complete financial picture of the applicant's finances or operating income for the year 1942.

That since the hearing held in this proceeding on November 12th, 1942, a proceeding was instituted before the Interstate Commerce Commission, entitled "Ex Parte No. 148 Increased Railway Rates, Fares and Charges, 1942".

That at hearings held in that case there were introduced in evidence Exhibits submitted on behalf of the Public Service Commission of the State of New York known as Exhibits Nos. A-33 and A-34. That these exhibits show the complete financial picture of the financial operations of the New York Central Railroad Company for the years 1941 and 1942.

That at page 5, table 11 of Exhibit A-33 there is set forth the net railway operating income after Federal and Canadian Income Taxes for the year 1941. That this amounts to the sum of \$61,883,063. It excludes the sum of \$4,464,303 for depreciation on B. & A. property applicable to a period prior to 1941. That Table 201 of Exhibit A-34, shows that in the year 1942 the net railway operating income of the company, after expenses and Federal Income Taxes amounted to \$90,399,495.

[fol. 87] That those same exhibits (A-33, page 8, Table 14, and A-34, Table 203) show the annual rate of return earned by the New York Central Railroad Company on the book value of its property for the year 1942 after payment of all expenses and Federal and Canadian Income Taxes was 5.06% as compared with a return on the same basis for the year 1941 of only 3.46%.

That the report in the instant proceeding accompanying the certificate or order dated March 20th, 1943, shows, according to said report, that the estimated annual loss in operating part of said line which was sought to be abandoned was the sum of \$56,941 based upon the average revenues of said line for the years 1940 and 1941.

That if this loss had been saved because of the fact that the Company was paying Federal and Canadian Income Taxes, the actual saving would have been \$22,775 less, or a net loss to the Company of \$34,165.00. Such a saving would have improved the rate of return earned by the Company of only 19.10000 of 1% (.00191148%). It is apparent that such an insignificant loss could not reasonably com-

stitute a burden upon interstate commerce. That if the proposed reduction in assessments is made as outlined below of \$224,000 amounting to a tax saving of \$8,772.76, the net loss would be correspondingly less.

That if the City of Yonkers, the protestant herein, were allowed to introduce the same figures included in said Exhibits Nos. A-33 and A-34 in Ex Parte No. 148 Increased Railway Rates, Fares and Charges, 1942, in this proceeding at a rehearing of this case, it would show the true financial picture of the applicant and that its financial condition was getting better year by year, and that in the light of its increased earnings it could not correctly maintain that the loss which it allocates to the operation of that part of the line which it seeks to abandon would interfere in the slightest with interstate commerce, and that there is no over-riding interest of interstate commerce to call for Federal interference directing abandonment.

That as we said above, the hearing in this proceeding was [fol. 88] held on November 12th, 1942. That these exhibits known as Nos. A-33 and A-34 were not prepared until February, 1943 so that they were not available at the hearing on this application which was held in the City of Yonkers, New York on November 12th, 1942 and, therefore, could not be introduced in evidence.

2. That the Interstate Commerce Commission has no jurisdiction.

That the applicant seeks to abandon that part of the Putnam Division or line running between Getty Square in the City of Yonkers, Westchester County, New York and Sedgwick Avenue, Bronx County, City of New York running between Van Cortlandt Park Junction located in the City of New York, Bronx County, New York, and Getty Square, Westchester County, New York.

That the evidence in this proceeding shows that this line runs from Getty Square, Yonkers, New York to Sedgwick Avenue in the City of New York, a distance of 7.8 miles. That that part of this line to be abandoned is only 3.1 miles of the said branch.

That, as indicated in the proof, the abandonment of this 3.1 miles of track could cause the discontinuance of all four stations in the City of Yonkers on said line, namely, Caryl, Lowerre, Park Hill and Getty Square.

That Chapter 481 of the Laws of 1910, which is now Section 54 of the Railroad Law of the Consolidated Laws contains these provisions in relation to the discontinuance of stations:

"Notice of starting trains; no preferences. Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the fare or freight legally authorized therefor. *No station established by any railroad corporation for the reception or delivery of passengers or property, or both, shall be discontinued without the consent of the public service commission first had and obtained*".

That it is to be noted that under this provision of law of New York State no station can be discontinued without the consent of the Public Service Commission first had [fol. 89] and obtained.

That it is significant the applicant in this case made no application to any New York State Board or other tribunal to discontinue the stations set forth above under the provisions of the New York Railroad Law heretofore quoted.

That it has been shown above that the continuance of that part of the line sought to be abandoned would not cause an undue hardship on interstate commerce.

That in the absence of over-riding interest of interstate commerce which required intervention by the Interstate Commerce Commission it has itself held that the Commission had no jurisdiction especially over curtailments of service and partial discontinuance and such matters are properly left within the regulatory authority of the states.

That in the instant proceeding the evidence shows that the application of the New York Central Railroad Company was for a partial discontinuance of one of its branches, and

if it desired in good faith to abandon all the branch, it should have included in its application for abandonment the entire branch running from Sedgwick Avenue in the City of New York to Getty Square in the City of Yonkers.

That as shown above the discontinuance asked for by the applicant is for only part of a branch line and the discontinuance of the four stations referred to above, a purely local curtailment of service.

That, therefore, the Interstate Commerce Commission has no jurisdiction as to the matters set forth in the original application.

3. *That the City of Yonkers has not had an opportunity to reduce any assessments of any of the land of the New York Central Railroad Company along that part of the Putnam Division which it desires to abandon in order to aid the railroad in the reduction of its operating expenses as far as the taxes on the land in question are concerned.*

That the reason that the City of Yonkers cannot reduce the assessment for the year 1942 for the 1943 taxes is because the New York Central Railroad Company made no application as required by the Tax Law of the State of New York for a reduction of the assessments for the said year [fol. 90] of its lands running along that part of its line which it desires to abandon. The New York Central Railroad Company can make no application to reduce the assessment for the next year until on or about October 1st, 1943 when the tentative assessment roll is filed for that year for the taxes of 1944.

As stated, the City of Yonkers cannot enter into an agreement with the New York Central Railroad Company to reduce any of the present assessments of the land in question.

This prohibition is contained in the Tax Law of the State of New York and where the method to review assessments for general taxation is outlined, Section 190 of the Tax Law, et seq.

That the Deputy Tax Commissioner of the City of Yonkers will make a substantial reduction of the assessments on the land of the New York Central Railroad Company for the assessment of 1943 for the taxes of 1944 along that part of its land it proposes to abandon if that part of line is continued. That he will do so in order to save the tax valuation of the other land affected by this proposed abandonment.

That his affidavit is attached hereto and marked Exhibit A.

The assessed valuation of the properties owned by the New York Central Railroad Company along the right of way along this proposed part of the line to be abandoned is the sum of \$374,000.00.

That Arthur J. McGregor, Deputy and Acting Commissioner of Assessment and Taxation of the City of Yonkers will reduce the assessment of said lands in the following amount, \$224,000, or to the amount of \$150,900, which would mean a saving in taxes for the New York Central Railroad Company in the sum of \$8,772.76 at the prevailing tax rate for the year 1943. That this arrangement cannot be effected, as already stated, until October 1st, 1943, and, therefore, the effective date of the order should be extended until October 15th, 1943, in order to give the City a chance to act, or such other reasonable time necessary to effect such compromise.

[fol. 9r] That the effect of said certificate and order is:

(a) To authorize a very prosperous carrier to abandon an electrically operated part of a line of road which has been in existence since 1888.

(b) To authorize the discontinuance of four stations, namely, Caryl, Lowerre, Park Hill and Getty Square which have been in existence since that time.

(c) Would subject the City of Yonkers to serious injury in that it would deprive the inhabitants of the communities of Caryl, Lowerre, Park Hill and the center of the City of transportation directly to Sedgwick Avenue in the City of New York.

(d) To cause a serious loss in property values with a consequent decline in taxable values. That this is a very serious proposition at the present time in view of the depreciation in real estate throughout the State of New York, except in certain communities, and it is so serious that it might result in such a decline in taxable values that there would be a collapse of assessed valuation which would affect seriously the financial situation of the City of Yonkers.

(e) To assume jurisdiction and exercise power in a case where the abandonment would subject the communities directly affected to serious injury while continued operation

would impose a relatively light burden upon the prosperous carrier; where there has been no demonstrated prejudice to interstate commerce; where the connection with interstate commerce is tenuous and casual; and where Congress has manifested an intent to leave the question of authorization of abandonments of part of lines of the general character of this particular branch to the States.

(f) To permit abandonment without giving any consideration to the serious injury which would result to the community by permitting abandonment where the local services remaining cannot give the relief to the community of the facilities which it necessarily requires.

And as additional grounds for granting a rehearing, and for a stay of the certificate and order made in this proceeding on March 20th, 1942, this petitioner respectfully alleges and shows:

[Vol. 92] There *there* is no evidence to support the conclusions expressed in the Report of the Commission (Sheets 4 and 5).

That the Commission erred in accepting as substantially correct the company's alleged operating losses for 1940-1941 on the part of the branch proposed to be abandoned. They were upon a method of prorating costs which is improper in an abandonment proceeding for the reason it was estimated on an improper basis.

That the Commission erred as a matter of law in assuming that it has jurisdiction or power:—

1. To permit an abandonment which will result in serious injury to the locality in the absence of facts showing that such abandonment is necessary in order to remove an appreciable burden from interstate commerce.

2. To permit an abandonment on the theory that a prosperous carrier is entitled to a return from each branch, part of branch and section of its road.

3. To direct abandonment of part of a line or branch and to curtail purely local service.

4. To authorize abandonment of this interurban electric railway line in violation of Section 7 (Paragraph 22) of the Interstate Commerce Act.

That the Commission erred in disregarding the evidence as to the serious injury to which the City of Yonkers would be subjected by the abandonment of part of the branch, including the deprivation of any through service from the City of Yonkers to Sedgwick Avenue, and the great loss in property values, when the continued operation of the branch would cause a relatively light burden upon the prosperous applicant.

That the Commission erred in giving undue consideration:

1. To the alleged ability of remaining transportation facilities to take care of traffic in the event that part of said line is abandoned.

2. The continued operation of the part of the branch sought to be abandoned, used exclusively in intrastate commerce, would burden or cripple the applicant's other lines and thereby affect the utility of them or of any of them as [fol. 93] arteries of interstate commerce.

3. The alleged loss sustained or that may be sustained in the continued operation of part of this branch in intrastate commerce would or could reduce the applicant's net railway operating income to a point where it would not earn a fair and reasonable return on its property.

4. The alleged loss sustained or that may be sustained by the applicant company on the particular part of the railroad line sought to be abandoned interfered or will interfere with interstate commerce.

That the certificate and order of the Commission in so far as it authorizes the applicant, operating under a charter from the State of New York to abandon a portion of its system, which it claims is unprofitable and retain those portions which may be profitable, is without authority in law and contrary to law.

That said certificate and order is without authority in law and contrary to law and contrary to the fair preponderance of the evidence before the Commission.

In view of the foregoing, this petitioner respectfully requests the Commission to stay the effective date of its certificate and order pending the determination of this application and of the rehearing that may be granted thereon.

Wherefore, this petitioner prays that a review, rehearing, reconsideration and reargument be granted in the

above entitled proceeding and that the certificate and order of the Commission, dated March 20th, 1943 be vacated and set aside and that an order be entered staying the New York Central Railroad Company from abandoning that part of its branch between Getty Square, Yonkers and Van Cortlandt Park Junction, County of Bronx, City of New York, or suspending service thereon pursuant to said certificate and order until the ultimate determination of this application, and until such a reasonable time as may be required to enable petitioner to seek a timely review in the courts of the validity of the Commission's order, and that the Commission enter such further order or orders in the premises as to it may seem just and reasonable.

City of Yonkers, Protestant. By: Paul L. Bleakley,
Corporation Counsel, City Hall, Yonkers, N. Y.

Dated at Yonkers, New York, April 15th, 1943.

[fol. 94]

EXHIBIT "A" to PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. FD-43914

In the Matter of the application of the New York Central Railroad Company for a certificate of public convenience and necessity permitting abandonment of the line of railroad extending from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, New York.

STATE OF NEW YORK,

COUNTY OF WESTCHESTER, ss:

ARTHUR J. MCGREGOR, being duly sworn, deposes and says that he resides at 257 Valentine Lane, in the City of Yonkers, New York.

That he is the Deputy and Acting Commissioner of Assessment and Taxation of the City of Yonkers, New York, and has held such office since the 16th day of July, 1941, and still continues to hold said office.

That as said official of the City of Yonkers he has charge of the assessment for the purposes of general taxation of all the land and improvements thereon within the City of Yonkers, which is a separate tax district.

That the land owned by the New York Central Railroad Company between Getty Square in the City of Yonkers and the southerly line of the City of Yonkers along the part of that branch of said railroad which the New York Central Railroad Company seeks to abandon consists of the following lots and blocks with the assessments thereon, including the improvements, for the year 1942 for the taxes of 1943:

	Block	Lot	Land	Improvements	Total
7001		1	\$150,000	\$63,600	\$213,600
7001		11	61,000	51,300	112,300
7001		15	32,500	15,600	48,100
Total			\$243,500	\$130,500	\$374,000

exclusive of parcel on South Broadway adjacent to the Park Hill Station and the land adjacent to the other stations.

[[fol. 95]] That the City of Yonkers and your deponent, as Deputy and Acting Commissioner of Assessment and Taxation of the City of Yonkers, are governed by the Tax Law of the State of New York, which is known as Chapter 62 of the Laws of 1909 (Consolidated Laws) as amended.

That in addition to the Tax Law, the City of Yonkers and your deponent, as Deputy and Acting Commissioner of Assessment and Taxation of the City of Yonkers, are also governed by Chapter 91 of the Laws of 1921 and Chapter 543 of the Laws of 1921.

That under these laws the tentative assessment roll for the year 1943 for the taxes of 1944 must be filed on October 1st, 1943.

That the assessment roll for the year 1942 for the tax year 1943 was filed in accordance with these laws on October 1st, 1942 and the said assessment roll was completed by your deponent on or about December 1st, 1942.

That during the period between October 1st, 1942, and December 1st, 1942 certain days, known as Grievance Days, were set aside, upon which days any property owner might file a protest and be heard as to the assessment on his property. That if such protest were filed, if the property owner so desired he could obtain a hearing before what is known as the Board of Review, a board consisting of your deponent, and William A. Schubert, the then Comptroller of the City of Yonkers, and Leonard G. McAteeny, the then Corporation Counsel of the City of Yonkers. That if this protest were filed and no action satisfactory to the property owner was had by the said Board of Review, the said property owner, under the Tax Law, after the rolls

were finally completed on December 1st, 1942, had an opportunity to test the assessment made on his property by petitioning the court to issue a writ of certiorari in what is known as a tax certiorari proceeding, within thirty days after the roll had been filed.

That the applicant in this proceeding failed to file either a protest or have a writ of certiorari issued to review the assessment for the year 1942 for the taxes of 1943, and therefore, your deponent, even if he so desired, was prohibited from reducing any of the assessments of the applicant. [fol. 96] can set forth in full above.

That as testified to at the hearing in this case held in the City of Yonkers, New York on the 12th day of November, 1942 the abandonment of that part of the line which the New York Central Railroad Company seeks to abandon would cause serious loss to the City of Yonkers in that it would cause a decrease in the valuations of the land in proximity to the line sought to be abandoned.

That in order to preserve the value of this property in the City of Yonkers along that part of the line sought to be abandoned, your deponent is prepared to reduce the assessments on the lands of the New York Central Railroad Company set forth above, providing that a proper application is made for said reduction.

That in order to preserve the continuation of that part of said branch and prevent a serious loss in tax values in the City of Yonkers, your deponent will reduce the said assessments in the sum of \$224,000 or to \$150,000, if there is no abandonment of that part of said line sought to be abandoned. That the tax rate of the City of Yonkers for the year 1943 was 3.916. That in the opinion of your deponent, the tax rate will be approximately the same for the year 1944.

Assuming the tax rate will be approximately the same for 1944, this proposed reduction in assessments would mean a saving to the New York Central Railroad Company, based on said approximate tax rate for 1944, of the sum of \$8,772.76.

That it is apparent on its face that this reduction in assessed valuation means a substantial saving for the New York Central Railroad Company and a substantial reduction in its operating expenses for that part of the line which it seeks to abandon.

That as shown above, it is impossible to reduce any assessment for the taxes of 1943 by reason of statutory provisions. However, this reduction in assessed valuation at the figure fixed by your deponent could be effected in the assessment as of October 1st, 1943 for the taxes of 1944, which your deponent is prepared to do, if that part of line which applicant seeks to abandon is still continued.

[fol. 97] That in view of the fact that this reduction cannot be made until on or about October 1st, 1943 your deponent asks in connection with this petition for a review, rehearing, reconsideration and reargument, and that the order of the Interstate Commerce Commission in the above entitled proceeding be stayed until on or about October 15th, 1943.

Arthur J. McGregor.

Sworn to before me this 16th day of April, 1943.
Veronica Herlihy, Notary Public, Westchester
County, New York.

[fol. 98]

EXHIBIT "L" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. FD-43914

In the Matter of the Application of the New York Central
RAILROAD COMPANY for a Certificate of Public Convenience
and Necessity Permitting Abandonment of the Line of
Railroad Extending from Van Cortlandt Park Junction,
New York City, to Getty Square, Yonkers, New York

Due April 26, 1943

Petition for a Further Hearing, Reconsideration and Vac-
ation of Order of March 20, 1943

To The Interstate Commerce Commission:

The Committee of Yonkers Commuters, protestants, and petitioners herein, hereby petition for a further hearing in this proceeding; reconsideration of the application of the New York Central Railroad Company, and vacation of the order of March 20, 1943, for the following reasons:

I

Extension of New York City Subway System Through Sedgwick Avenue

The petitioners desire to introduce in the record in this proceeding certain important and newly discovered documentary evidence showing that the City of New York, as part of its post war program of public works, intends to extend its subway system from the terminus of the Broadway-Lenox Avenue Line at 145th Street and Lenox Avenue, New York City, to 155th Street and Eighth Avenue and thence in with the existing two-track connection with the Jerome Avenue Line of the I. R. T. Subway, thus making Sedgwick Avenue, the present southern terminus of the electric inter-urban service from Getty Square, Yonkers, a regular station in the New York City subway system.

The issue appearing in the third paragraph on sheet 5 of the report of Division 4 of the Commission, dated March 20, 1943, as to the intent of the City of New York to build the extension, and the acceptance by Division 4 of the statement of the attorney for the City of New York upon the [fol. 99] argument of exceptions to the proposed report of the examiner "that in his opinion the city will not build the extension", in the light of his further admission during the argument that he did not know anything about the project, requires a formal inquiry by the Commission into the issue through a further hearing. The petitioners claim the right to submit to the Commission certain documentary and oral evidence in support of their contention for the protection of their rights and in justice to the public whose interests are directly involved in this proceeding.

As evidence that the said opinion expressed by the counsel for the City of New York above mentioned is unfounded and that the facts lead to a contrary conclusion, petitioners attach hereto a photostatic copy of a letter dated November 8, 1939 written by the Comptroller of the City of New York and the Chairman of the Board of Transportation, to the Transit Commission of the State of New York in connection with the proposed discontinuance of the Ninth Avenue Elevated Line, setting forth that they would recommend to the Board of Estimate:

"(a) that the 162nd Street extension at present linking the Jerome Avenue Woodlawn Line of Interbor-

ough with the Ninth Avenue elevated line, be not condemned but remain in operation;

(b) that stations be maintained at Anderson Avenue, Jerome Avenue, Sedgwick Avenue and the Polo Grounds;

(c) that a connection be constructed between the extension from, at or near the Polo Grounds to the 145th Street station of the present Interborough-Lenox Avenue Line;

(d) that through service be maintained over the extension and the above mentioned connection from the Bronx to the west side of Manhattan;

Petitioners also desire to introduce existing documentary evidence:

1. That this project is the second item on the list of 27 transportation projects of the Board of Transportation of a total estimated cost of over \$990,000,000 to be put into execution at the conclusion of the war;

[fol. 100] 2. That in the capital budget for 1943 of the City of New York, adopted in December, 1942, an appropriation of \$150,000 was made for engineering, administrative and other expenses in connection with the Broadway-Lenox Avenue Line extension to 162nd Street, Jerome Avenue Line;

3. That this project is the second in priority of five projects so urgently needed that any postponement will seriously hamper the Board of Transportation in meeting the reasonable requirements of the travelling public;

4. That the structural drawings for this project have now been completed for contract purposes;

5. That the cost of performing this contract including land, structure and excavation is estimated at \$3,260,000, by the New York City Board of Transportation;

6. That this project is included in the prospectus issued by the City Planning Commission of the City of New York of its proposed Post-War Works Program as supplemented October, 1942;

7. That as soon as the Broadway-Lenox Avenue extension shall have been completed traffic conditions at the

terminus of the Getty Square Branch at Sedgwick Avenue will be restored as a matter of convenience, accessibility and economy comparable to conditions existing when the Ninth and Sixth Avenue elevated lines supplied service at Sedgwick Avenue during the prosperous years of the Getty Square Branch as described at pages 13 and 14 of the Questionnaire filed herein by the applicant.

Counsel for petitioners had no knowledge of the foregoing state of facts prior to February 24, 1943, when the project was called to his attention in response to a questionnaire circulated by the petitioners.

[fol. 101]

II

Reduction of Taxes by the City of Yonkers

Petitioners desire to place in the record herein facts showing that the Commissioner of Assessment and Taxation of the City of Yonkers is now preparing the current assessment rolls of the City to be filed on or before September 1, 1943. And that with the approval of a majority of the Common Council and of the City Manager of the City of Yonkers, with all of whom counsel for the petitioners has conferred, he is assessing the real estate in the applicant's right of way from the north boundary of Van Cortlandt Park to the terminus at Getty Square upon a net income producing basis thereby reducing the taxes payable thereon by approximately \$20,000 annually.

This information was not available to be adduced before the examiner and included in the record of the hearing of November 12, 1942, for the reason that the policy was subsequently adopted by the competent authorities of the City of Yonkers.

Petitioners desire to show also that the applicant should be able to cause the taxes it pays to the City of New York on its right of way through Van Cortlandt Park north of the junction to be reduced by approximately \$10,000, thus further reducing its alleged operating deficit on the Getty Square Branch.

III

Jurisdiction of the Interstate Commerce Commission

Petitioners claim that the Interstate Commerce Commission is without jurisdiction to consider and act upon the ap-

plication of the New York Central Railroad Company herein because (1) the line sought to be abandoned is an interurban electric passenger railway located wholly within the State of New York and (2) because of the following facts which have developed since the hearing herein, evidence of which the petitioners ask leave to introduce at the further hearing requested.

[fol. 102] The annual report of the New York Central Railroad Company to its stockholders as of April 17, 1943, reveals that during the calendar year 1942, the net income of the applicant throughout its system increased to \$49,082,183 after interest, taxes and charges.

The announced earnings during the year 1943 of the New York Central Railroad Company shows a net income for the month of February, 1943, of \$6,027,640 as compared with \$1,024,472 for the month of February, 1942, and for the combined months of January and February, 1943, a net income of \$10,710,937, after taxes and charges, as compared with \$1,434,376 for the similar period in 1942.

Petitioners claim that by reason of said facts the alleged annual operating deficit of the Getty Square Branch claimed by the applicant is insignificant and does not operate to burden or cripple the interstate and foreign commerce utility or service of the applicant.

The foregoing facts as to net income were not in existence and were not available for presentation at the hearing held herein on November 12, 1942.

IV

Traffic Volume

The petitioners also desire to include in the record herein the fact that passenger traffic upon the Hudson River Division below Yonkers has materially increased since the hearing on November 12, 1942, so that passengers changing at High Bridge and University Heights from the Getty Square Branch are obliged to stand as there are not enough seats provided.

Also that although more than 1000 persons have entered the armed services from the Eighth Ward of Yonkers alone and over 11,000 from the City of Yonkers, the traffic on the Getty Square Branch has been consistently increasing.

Petitioners claim that chaotic economic conditions brought about by the war emergency should not form any

basis for the abandonment of long established means of transportation such as the Getty Square Branch and the *status quo* should not be disturbed until conditions again reach a normal status.

[fol. 103] In the absence of so many Yonkers residents in the armed services it would be most unfair to affect vital transportation facilities upon which the citizens of Yonkers should be able to rely during the post-war reconstruction period.

Hasty action in dismantling the Branch might result in irrevocable and disastrous injury in the event of post-war developments and necessities.

On the other hand, the alleged deficit in operating revenue is so insignificant in comparison with the huge increase in net income the applicant is enjoying for the war period that the Branch does not constitute any burden on the applicant's system within the meaning of the Interstate Commerce Act.

The danger of error in dismantling the Branch before it is known what the war will bring forth is immeasurably greater than in continuing the Branch for the duration when its status may be properly evaluated. The Line may easily be discontinued at any time if conditions warrant but it could never be reconstructed except at prohibitive cost.

V

Bus Service

Petitioners also desire to introduce further evidence of inadequate and deteriorating bus transportation service reflecting current conditions and demonstrating its inadequacy to accommodate the traffic that would result from the discontinuance of the Getty Square Branch. This information, of course, was not available in November, 1942, and could not have been adduced at that time.

Conclusion

Petitioners therefore respectfully request a further hearing and a reconsideration of the application and that the order of Division 4 herein dated March 20, 1943, be vacated or, in the alternative, suspended for the duration of the war without prejudice to a renewal of the application if and when warranted, April 15, 1943.

Horace M. Gray, Counsel for Petitioners, Committee of Yonkers Commuters.

[fol. 104] City of New York, Office of the Comptroller

November 8, 1939.

The Transit Commission, 270 Madison Avenue, New York City.

Re: Case No. 3490

GENTLEMEN:

The above case arises out of a resolution adopted by the Board of Estimate which requests your Commission to give its approval to the condemnation by the City of New York of the Ninth Avenue Elevated Railroad Line, as described in Section 141-6.1 of the Administrative Code of the City of New York, pursuant to the provisions of that Section.

As has already been stated on the record on behalf of the City, the City proposes to condemn and demolish the Ninth Avenue Elevated Railroad only in the event that the Interborough-Manhattan Unification Plan is consummated. In the event of the consummation of that Plan and the granting by your Commission of the approval requested in this case, we shall recommend to the Board of Estimate:

(a) that the 162nd Street Extension, at present linking the Jerome Avenue-Woodlawn Line of Interborough with the Ninth Avenue Elevated Line, be not condemned but remain in operation;

(b) that stations be maintained at Anderson Avenue-Jerome Avenue, Sedgwick Avenue and the Polo Grounds;

(c) that a connection be constructed between the Extension from at or near the Polo Grounds to the 145th Street station of the present Interborough Lenox Avenue Line;

(d) that through service be maintained over the Extension and the above mentioned connection from the Bronx to the west side of Manhattan; and

(e) that a free transfer point be established at 161st Street and River Avenue between the present Jerome Avenue-Woodlawn Line of Interborough and Independent System.

Very truly yours, (Signed) Joseph D. McGoldrick,
Comptroller; (Signed) John H. Delaney, Chair-
man, Board of Transportation.

[fol. 105] EXHIBIT "M" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13914

In the Matter of the Application of THE NEW YORK CENTRAL RAILROAD COMPANY under Paragraph (18) to (20), Inclusive, of Section 1 of the Interstate Commerce Act a Certificate that the Present and Future Public Convenience and Necessity Permit of the Abandonment by The New York Central Railroad Company of a Line or Railroad Between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York

Petition of Public Service Commission of the State of New York for a Further Hearing, Reconsideration, Vacation or Suspension of Order of March 20, 1943

The Public Service Commission of the State of New York hereby joins in the petitions filed in this proceeding by the City of Yonkers dated April 15, 1943 and by Horace M. Gray, Counsel for the Committee of Yonkers Commuters dated April 15, 1943, both of which said petitions request a further hearing and a reconsideration of the decision by Division 4 on the New York Central's application in this proceeding; that the orders herein adopted by Division 4 be vacated and set aside and the application denied, or in the alternative that said orders be suspended for the duration of the war.

The grounds upon which this petition is based are fully set forth in said petitions of the City of Yonkers and the Committee of Yonkers Commuters and in the exceptions to the examiner's report in this proceeding heretofore filed by this Commission and for that reason same will not be repeated at length herein.

[fol. 106] It is therefore respectfully requested that this Commission reconsider and deny the application of the New York Central herein by vacating and setting aside the order of Division 4 adopted on March 20, 1943, or in the alternative that a further hearing or rehearing be held and that the order of March 20 be suspended.

Public Service Commission of the State of New York,
by (Signed) Gay H. Brown, Counsel, 80 Centre
Street, New York, N. Y.

[fol. 107]

Certificate of Service

I hereby certify that I have this day served the foregoing petition upon all parties of record in the above proceeding by mailing by first class mail a copy thereof, properly addressed, to each other party.

(Signed) John T. Ryan.

Dated New York, N. Y., April 17, 1943.

[fol. 108]

EXHIBIT "N" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13913

New York Central Railroad Company Abandonment

Applicant's Reply to Petitions for Further Hearing, Reconsideration, Vacation or Suspension of the Order of March 20, 1943

The Committee of Yonkers Commuters and the City of Yonkers have filed petitions for further hearing, reconsideration, vacation or suspension of the order of March 20, 1943, which authorized abandonment of the applicant's Yonkers Branch. The Public Service Commission of the State of New York in a separate document joins in both of the other petitions without stating independent grounds. The effective day of the order has been postponed from April 29 to May 29, 1943.

A full hearing with ample opportunity to present evidence has already been accorded. Nothing appears in the petitions to warrant giving these protestants further hearing, reconsideration, vacation or suspension. Except for the statement in the Commuters' petition about the effect of a proposed extension of a New York City subway after the war and statements in both the Commuters' and City's petitions about reduction in Yonkers city taxes, there is nothing in the petitions worthy of consideration which has not already been fully considered in this proceeding. The Commission clearly has jurisdiction to authorize abandonment of all operations on the line. See *Raquette Lake Railway Abandonment*, 199 I. C. C. 278, order sustained

Town of Inlet, et al. v. New York Central R. Co., 7 F. Supp. 781. The principal emphasis in this reply will be on the subway and tax features.

[fol. 109]

Preliminary Statement

Evidence adduced at the hearing showed: (1) declining patronage of the line by the local community over a period of years, (2) substantial out-of-pocket loss in the past and no hope for profitable operation in the future, (3) existence of other satisfactory modes of transportation which the community has elected to support, (4) need elsewhere on applicant's line for the passenger cars now used in rendering service, and (5) need of the scrap material in the line for war time use and production.

(1) Though the line has been in operation over 50 years it has outlived its usefulness for the community no longer patronizes it. The tributary area has a population of 8,000 to 13,000, according to applicant, and 38,000, according to protestants, yet only 600 people per day use the line to go from and to Yonkers. In other words, the line is not used by 95 to 98.4 percent of the people in the area.

The line was electrified at considerable expense in 1926 but an increase in patronage did not result and by 1942 the business was only 25 per cent of what it had been twelve years before. The line did not regain the traffic lost in the early thirties nearly to the extent that applicant's other commutation lines regained traffic. The hearing revealed no hope of increasing the traffic without resort to grandiose schemes of new construction or fare reductions. Up to the time of the hearing emergency conditions brought about by war had produced only a 2.87 per cent increase in patronage compared with a 25 per cent increase on the competing trolley line, 13 per cent on the bus line and 12 per cent on applicant's other lines in the New York metropolitan area. The petitions allege no new traffic conditions warranting any different result at the present time. It is possible that the threat of abandonment may now be inducing a little increased patronage, but this would have to be discounted as of doubtful permanence if the proceeding was reopened.

(2) The figure of \$56,941 is used in the report as the annual out-of-pocket loss resulting from operation of the [fol. 110] line sought to be abandoned. As is pointed out in detail in applicant's reply to protestants' exceptions this

figure understates the actual loss. This fact is important in evaluating the benefit of a promised subway connection now emphasized and in seeing what help there is in tax saving belatedly offered by the City of Yonkers.

The \$56,941 includes no credit for revenue that will undoubtedly be received from passengers who will use applicant's Hudson Division instead of the branch after the abandonment. No station on the line to be abandoned is more than a mile and a half from a station on the Hudson Division. The Hudson Division is in a position to render more frequent service and takes its passengers directly to Grand Central Terminal without the inconvenient transfer at High Bridge encountered by the Yonkers Branch passengers. More than two-thirds of the revenue assigned to the branch comes from passengers now transferring to or from the Hudson Division. It is reasonable to suppose that after the abandonment many of these passengers will go directly to the Hudson Division as some of their immediate neighbors now prefer to do.

Then too, the \$56,941 figure gives the line credit for all revenue beyond without deducting expense for handling on the Hudson Division. The item of \$30,517 shown on Sheet 4 of the report as the cost of moving traffic over other parts of the system covers only the Putnam Division. In 1941 the Hudson Division revenue was \$31,559 out of a total of \$45,422 assigned to the branch. The expense of transporting these branch passengers on the Hudson Division each day would be considerable. It is thus apparent that a full statement of the out-of-pocket cost connected with passenger service on the branch would greatly exceed the figure of \$56,941 used in the report.

(3) Suitable alternate means of transportation are available in the community and are being used by the vast majority of the traveling public. Three alternate means of transportation are described in the report: (a) Bus service connecting the areas served by the line with the applicant's [fol. 111] Hudson Division at Ludlow and Yonkers stations. The bus service is convenient and economical. The president of the line testified that he had sufficient equipment available to render service even during this emergency period and undoubtedly will be able to secure special permits if such are needed to provide increased service if the abandonment produces a substantial increase in traffic. (b)

Trolley service via Broadway, which parallels the line on the west, affords connection with the New York City subway at 242nd Street and also with the New York Central Hudson Division trains at 225th Street. The service rendered by the trolley line is not only cheap—the fare is five cents—but is adequate and more riders can be accommodated. (c) Trolley service via McLean avenue in an easterly direction to applicant's Lincoln station on the Putnam Division and to the New York City subway at Woodlawn is also available for the few people who must go in that direction. Many communities now have to get along with transportation service less desirable by far than what will be left in the area served by the Yonkers Branch. A community has no just grounds for complaint when the agency it does not patronize is permitted to withdraw.

(4) The eleven multiple unit cars now being used in rendering service on this line can be used to greater advantage elsewhere on applicant's system during this emergency period. As is pointed out on Sheet 5 of the report and in greater detail in the record, the applicant is using standard day coaches on certain commutation runs on its Harlem Electric Division. The multiple unit electric cars now used on the Yonkers Branch when placed in this service would release eleven standard coaches. There is no need to demonstrate here that there is a crying need for such coaches, not only on the applicant's line, but on the lines of many other railroads in the United States. There is no warrant for tying up, in effect, a full train of standard passenger cars to render this unremunerative, little used service.

(5) The net salvage value of materials to be released by this abandonment is stated on Sheet 5 of the report as \$53,823. The record shows that the material consists of 65,000 lineal feet of rail, weighing 1,162 gross tons, 39,600 [fol. 112] tie plates, and approximately 1,000 tons of bridge metal, together with miscellaneous scrap from signal and transmission devices. To defer abandonment until after the war would deprive the country of the use of this scrap material. The rail and track fastening can be used directly in constructing extensions to war industries and other tracks needed by the applicant. The other metal to be salvaged is high grade scrap. Devoting it to that use, rather than the present use, is manifestly in the public interest.

The Yonkers Commuters insist that a rehearing is necessary to put in evidence a plan of the City of New York to restore a rapid transit connection at Sedgwick Avenue, the terminus of the Putnam Division in New York City which is used by Yonkers Branch trains. The line itself, the one part to be actually abandoned, ends at Van Cortlandt Park Junction, but service is maintained over the Putnam Division an additional 4.69 miles to Sedgwick Avenue. The plan appears to involve the extension of a stub end of the Broadway-Lenox subway at 145th Street (See Exs. 1 and 2) in a northerly direction on the south side of the Harlem River to form a connection with the elevated line now terminating at 155th Street, thereby restoring Sedgwick Avenue as a stop on a through line to downtown New York, as in the days of the Ninth Avenue elevated.

What is sought to be introduced as newly discovered evidence has been under consideration for several years, and since November, 1939, has been a matter of public record. The proposal is not in any way connected with the Yonkers Branch and is not designed to aid the people of Yonkers, particularly nor to help the New York Central Railroad Company. It was proposed in connection with the elimination of the Ninth Avenue elevated line and appears to have helped make the elimination of that line possible.

It is significant that the elevated line stopped running on June 11, 1940, without the subway connection having been made. Construction has been further deferred until an indefinite [fol. 113] definite time which no man can now foresee—the end of the war. We can only assume, and we must assume as did Commissioner Porter in his recent dissent in the reopening of Ex Parte 148 that “this war will last several years longer.” It is, of course, proper to make plans with the end of the war in view, but it would be folly to assume at this relatively early stage of the war that such plans will necessarily be carried out. No man can anticipate what the conditions will be at the end of the war, what funds will be available or when construction will commence or end. Conditions after the war, not present conditions, will determine what construction projects will be important. It would be a manifest injustice to the applicant to deny permission to abandon the Yonkers Branch because of a postwar plan that may never materialize, particularly when the plan it

self promises so little in the way of relief and has already been deferred at least four years.

All that is claimed for the plan is that it will restore the connection the line once had with the Ninth Avenue elevated. When this line was in operation Sedgwick Avenue had a direct connection to downtown New York. What that connection was worth in revenue to the Yonkers Branch appears on page 20 (Ex. 5) of the *Return the Questionnaire*. Under the bracket marked Connecting Line is a Sedgwick Avenue column having reference mark (2) which refers to Passengers using the line to reach Sedgwick Avenue. The \$5,000 drop in Sedgwick Avenue revenue between 1940 and 1941 may be attributed to the loss of the Ninth Avenue elevated connection. Since this connection was in operation for five months during 1940, its value may be figured at approximately \$1,000 per month. Division Four's report uses an average of the 1940 and 1941 revenue in calculating annual loss. In order to ascertain what the loss figure in the report would have been with the Ninth Avenue elevated connection in, it is only necessary to add \$1,000 per month to the revenue during the period when it was out. It was out for 19 of the 24 months involved, so that \$19,000 must be added to the two year revenue figure, or \$9,500 to the average [fol. 114] age of the two years. Therefore, the net result of having a connection with the Ninth Avenue would have been to reduce the annual loss figure from \$56,941 to \$47,441.

The reason why a subway connection would have so little effect on the revenue is that the bulk of the patrons would continue to transfer, as they always have, to Hudson Division trains rather than go to Sedgwick Avenue. Even when \$1,000 per month is added to the Sedgwick Avenue revenue for the year 1941, assuming other traffic conditions to be the same, it remains that only 37 per cent of the revenue would come from Sedgwick Avenue passengers.

It is a mistake to assume that the branch was profitable as long as it had the elevated connection. Studies made by the applicant in 1938 produced a loss as great as in 1942. Application to abandon was deferred at that time on the City's undertaking to look into the taxes and the service was cut down to 17 trains a day each way with no Sunday service in an effort to cut expenses. However, patronage dropped about in proportion to the cut in expense, and, other remedies having failed, there was no alternative but

to seek permission to abandon. The loss of the elevated connection is but a minor consideration in the general trend.

The decision that public convenience and necessity permit abandonment of the branch is not predicated upon the loss being precisely \$56,941. Any appreciable loss is sufficient, especially where other means of transportation are available and are being used by the community. It is submitted that no different decision would have been rendered had the proposed evidence been submitted and considered in the first instance. Hence, there is no reason for further hearing, reconsideration, vacation or suspension on that account.

II

The tax saving offered by the City of Yonkers is much the same as the subway connection held out by the Committee of Yonkers Commuters. It offers too little and comes too [fol. 115] late. Even complete exemption of the line from taxation within the City of Yonkers would cut off only \$23,000 in expense, leaving a \$33,000 out of the annual loss of \$56,000 found in the report. The suggestion, page 6 of the Commuters' petition, that \$10,000 can be lopped off of the New York City tax bill on the right of way through Van Cortlandt Park is not only without support but is highly improbable at best, since the City of New York, being in favor of the abandonment, is not likely to reduce the taxes on the right of way by any such amount. The New York City tax bill is approximately \$11,000. A 90 per cent reduction or any very large reduction is obviously out of the question.

The petition of the City of Yonkers does not support the petition of the Committee of Yonkers Commuters as to the amount of the cut the Commissioner of Assessments proposes to make in the assessment, nor does the City's petition give the full picture. According to the Commuters' petition \$20,000 will be cut off a tax bill of \$23,000, leaving the assessment on some sort of a net income basis. However, the Commissioner of Assessments in his affidavit attached to the City's petition says that the cut will be \$8,772.76 based on a reduction in assessed value of the right of way from \$374,000 to \$150,000. In order to obtain the assessed valuation remaining for tax purposes it is neces-

sary to add to the \$150,000 the sum of \$130,500 for improvements and \$75,000 for special franchise, leaving an assessed valuation of \$355,500 for the line, which would mean about \$15,000 per year in taxes.

The Commissioner of Assessment cannot even promise the \$8,772.76 reduction for 1944 taxes until after the assessment roll is ready October 1, 1943. The reason is, of course, that as a public servant he has no legal right to make advance commitments, even for six months, while the administration under which he serves is in office. There can in the nature of things be no guarantee that any tax adjustment presently made will be permanent. The political situation may change with the next election and some future Commissioner of Assessments may see fit to assess all the [fol. 116] railroad's property in Yonkers on a different basis. The suggestion that the proceeding be stayed until October 15, 1943, to enable the Commissioner of Assessments to make the reduction should be disregarded for the expense of continuing operation in the interim would eat up many years' saving in taxes.

Further hearing, reconsideration, suspension or vacation of the order of March 20, 1943, are not necessary to show the proposed tax reduction. As has already been said herein in connection with the subway connection, the abandonment was not authorized because of a loss of precisely \$56,941. Any appreciable loss is sufficient. What is proposed to be shown would not affect the result.

Respectfully submitted, Thomas P. Healy, H. H. McLean, Counsel.

April 26, 1943.

466 Lexington Ave., New York, N. Y.

[fol. 117]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in the above proceedings by mailing by first class mail a copy thereof, properly addressed, to each other party.

Dated at New York, N. Y., this 23rd day of April, 1943.

H. H. McLean.

[fol. 118] EXHIBIT "O" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. FD-13914

In the Matter of the Application of the NEW YORK CENTRAL RAILROAD COMPANY for a Certificate of Public Convenience and Necessity permitting abandonment of the line of railroad extending from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, New York.

Memorandum of The City of New York
In Opposition to Application for
Further Hearing

This memorandum is addressed only to the so-called newly discovered evidence which involves the City of New York, viz.: (1) the City's proposal, first suggested in 1939, to extend the Broadway-Lenox Avenue subway line to Sedgwick Avenue, and (2) the suggestion that the taxes assessed against the New York Central's right-of-way through Van Cortlandt Park be reduced by the City of New York by approximately \$10,000.

(1)

The proposal to extend the Broadway-Lenox Avenue subway to Sedgwick Avenue is hardly a new one, having been first suggested in 1939. Along with several hundred other possible projects, it is included among a huge collection of plans from which a post-war program will be chosen. How far it is from realization is indicated by the fact that it has not yet been brought to the attention of the City's Law Department. This, of course, explains why the City's representative knew nothing about this proposal when it was first mentioned by the protestants upon oral argument before this Commission.

Even if we were to assume the existence of a proposed subway connection and an increase in New York Central passengers to the number that used the line prior to the discontinuance of the Ninth Avenue elevated railroad, the [fol. 119] net loss sustained by the New York Central would still be very substantial (Return to Questionnaire, Ex. 3, p. 20).

(2)

While it is not possible for the City of New York to arrange tax reductions in advance, it is possible to show the complete absence of any rational basis for petitioners'

desire to show also that the applicant should be able to cause the taxes it pays to the City of New York on its right of way through Van Cortlandt Park north of the junction to be reduced by approximately \$10,000 * * *

This portion of the right-of-way is now assessed as follows: land—\$198,500, improvements—\$169,270, producing an annual tax of \$10,959. To suggest that it may be possible to reduce this tax by about 90% is mere wishful thinking—not evidence.

Conclusion

The application for a further hearing should be denied. The City of New York, by Thomas D. Thacher, Corporation Counsel, Municipal Building, New York City, N. Y.

Certificate of Service

I hereby certify that I have this day served the within memorandum upon all parties of record in the above proceeding by mailing by first class mail a copy thereof, properly addressed, to each other party.

Harry Hertzoff.

Dated, New York, N. Y. April 22, 1943.

[fol. 120] EXHIBIT "P" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13914

New York Central Railroad Company Abandonment

Present: Claude R. Porter, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding, and of the petition of the protestants for reconsideration and rehearing:

It is ordered, That the effective date of the certificate issued herein dated March 20, 1943, be, and it is hereby, extended for 30 days to May 29, 1943.

Dated at Washington, D. C., this 19th day of April, A. D. 1943.

By the Commission. Commissioner Porter.

W. P. Bartel, Secretary. (Seal.)

[fol. 121]

EXHIBIT "Q" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of May A. D. 1943.

Finance Docket No. 13914

New York Central Railroad Company Abandonment

Upon further consideration of the record in the above entitled proceeding, of the petitions of the protestants for rehearing and of the answers of the applicant and the City of New York to said petitions:

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fols. 122-123] [File endorsement omitted.]

[fol. 124] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed June 1,
1943

Now comes the United States of America, defendant in the above-entitled case, and for answer to the complaint herein:

1. Admits the allegations of paragraphs 1 through 6 of the complaint.

2. Admits that, as alleged in paragraph 7 of the complaint, the Commission held a public hearing upon said application, at Yonkers, New York, on November 12, 1942, at which the defendant New York Central Railroad Company and the plaintiffs herein were represented by counsel. For further answer, alleges that it has no knowledge as to what plaintiffs have done or will do with the transcript of the record, and states that it will object at the hearing to the introduction before this Court of a copy of the transcript of the record which has not been officially certified and verified by the Interstate Commerce Commission.⁵

3. Admits the allegations of paragraph 8 of the complaint, but denies that they in any way affect the validity of the order.

4. Admits the allegations of paragraphs 9 through 12 of the complaint.

5. Admits that, as alleged in paragraph 13 of the complaint, oral argument was heard before Division 4 of the Interstate Commerce Commission on March 3, 1943. For further answer, alleges that it has no knowledge as to what plaintiffs have done or will do with the transcript of the record of the oral argument, and alleges that it will object at the hearing to the introduction before this Court of any transcript of record before the Commission which has not been officially certified and verified by the Commission.

6. Admits the allegations of paragraphs 14 through 16 of the complaint.

7. Admits the allegations of paragraphs 17 and 18 of the complaint, except that it alleges that the effective date of the Commission's order has now been extended to June 12, 1943.

8. Admits that, as alleged in paragraph 19 of the complaint, the so-called Yonkers Branch of the New York Central Railroad Company runs from Getty Square in the City of Yonkers, New York, to Van Cortlandt Park Junction where it connects with the Putnam Division of the New York Central, extending on to Sedgwick Avenue in the City of New York; that the Yonkers Branch is located wholly within the State of New York and that it carries no freight.

Denies that, as alleged in said paragraph, the Yonkers Branch is merely a part of a suburban or interurban electric railway, or that it is not operated as a part or parts of a general steam railway system of transportation. Alleges that it has no knowledge as to whether the passengers which the Yonkers Branch carries between Yonkers and New York continue on in certain cases in interstate commerce, but alleges that whether or not they do is immaterial so far as the validity of the Commission's order is concerned.

9. Denies the allegations of paragraph 20 of the complaint.

10. Denies that, as alleged in paragraph 21 of the complaint, the Commission denied plaintiffs a fair and adequate hearing and that it denied plaintiffs an opportunity to present any material and relevant evidence.

[fol. 126] 11. Denies the allegations of paragraph 22 of the complaint.

12. Denies the allegations of paragraph 23 of the complaint except as they are consistent with the statements made in the report of the Commission herein, and further denies that the Commission's order subjects the City of Yonkers to any unlawful injury.

13. Admits the allegation of paragraph 24 that the abandonment of the Yonkers Branch will result in the discontinuance of four stations in the City of Yonkers, but alleges that the Commission has exclusive jurisdiction to permit the abandonment of the line and that, therefore, the consent of the Public Service Commission of the State of New York to the discontinuance of the stations on the line is not required by law.

14. Denies that any damage to which the Commission's order will subject plaintiffs will be irreparable or unlawful, as alleged in paragraph 25.

15. Admits the allegations of paragraph 26 of the complaint.

Wherefore, it is respectfully prayed that the complaint be dismissed.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

[fol. 127]

Certificate of Service

I hereby certify that a copy of the foregoing answer was this day served by mail upon the following counsel:

J. Stanley Payne, Esq., Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.

Harold H. McLean, Esq., Commerce Counsel, New York Central System, 466 Lexington Avenue, New York, N. Y.

Horace M. Gray, Esq., 42 Broadway, New York, N. Y.

Gay H. Brown, Esq., Counsel, Public Service Commission, 80 Centre Street, New York, N. Y.

Paul L. Bleakley, Esq., Corporation Counsel, City Hall, Yonkers, N. Y.

Robert L. Pierce, Special Assistant to the Attorney General.

May 29, 1943.

[fols. 128-129] IN DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—

Filed June 1, 1943

To the Honorable Judges of Said Court:

In accordance with the provisions of Section 212 of the Judicial Code (36 Stat. L. 1150, 28 U. S. C. 45a), we hereby enter the appearance of the Interstate Commerce Commission as a party defendant in the above-entitled case, and of ourselves as its counsel.

Daniel W. Knowlton, Chief Counsel. J. Stanley
Payne, Assistant Chief Counsel, Washington, D. C.

[fol. 130] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June
1, 1943

The Interstate Commerce Commission, intervening defendant, hereinafter called the Commission, for answer to the complaint herein:

1. Admits that on March 20, 1943, it issued a report

and an order, under section 1 (18), (19) and (20) of the Interstate Commerce Act (49 U. S. Code, sec. 1), certifying that public convenience and necessity permit abandonment by the New York Central Railroad Company of its Yonkers Branch extending from Van Cortlandt Park Junction, New York, N. Y., to Getty Square, Yonkers, N. Y., a distance of approximately 3.1 miles, denies that said order is arbitrary or capricious, denies that it is not supported by substantial evidence, denies that it is contrary to the evidence of record, denies that it was made without affording to the plaintiffs herein a fair and adequate hearing, denies that in making it it exceeded its statutory authority, admits, for the purposes of this suit, the allegations of paragraphs 1 to 6, both inclusive, 8 to 12, both inclusive, 14 to 18, both [fol. 131] inclusive, and 26, and denies the allegations of paragraphs 21 and 22.

2. Admits so much of paragraph 7 as alleges that it held a public hearing upon said application at Yonkers, N. Y., on November 12, 1942, at which defendant The New York Central Railroad Company and plaintiffs were represented by counsel.

3. Admits so much of paragraph 13 as alleges that on March 3, 1943, oral argument in said proceeding was heard before Division 4 of the Commission.

4. Denies the allegations of paragraph 19 that the said Yonkers Branch is a part of a suburban or interurban electric railway, denies that said branch is not operated as a part or parts of a general steam railroad system of transportation, admits that the same is located wholly within the State of New York, denies that it is not operated in interstate commerce, admits that it carries no freight, and denies that its passenger traffic is carried solely between points located in the City of Yonkers and the City of New York.

5. Denies the allegation in paragraph 20 that it was without jurisdiction or power to authorize or permit the abandonment of said Yonkers Branch and denies the allegation that its aforesaid order purporting to do so is null and void.

6. Denies the allegations of paragraph 23 and denies that its aforesaid order will subject the City of Yonkers to any legal injury or damage.

7. Admits the allegation in paragraph 24 that the abandonment of said Yonkers Branch will result in discontinuance of four stations in the City of Yonkers but alleges that it has exclusive jurisdiction to permit the abandonment of the Line and that therefore the consent of the [fol. 132] Public Service Commission of the State of New York to the discontinuance of the stations on the line is not required by law.

8. Denies the allegation in paragraph 25 that plaintiffs will suffer great and irreparable loss and damage by the abandonment of said Yonkers Branch and denies that its order and certificate here challenged will cause plaintiffs any legal injury or damage.

Wherefore, having fully answered, the Commission moves that the complaint be dismissed.

Interstate Commerce Commission, By J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 133] *Duly sworn to by Claude R. Porter, jurat omitted in printing.*

[fol. 134] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF NEW YORK CENTRAL RAILROAD CO.—Filed June 1, 1943

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The New York Central Railroad Company, one of the defendants in the above entitled cause, for answer to the bill of complaint herein:

I

Denies the allegations contained in the paragraph preceding the paragraph numbered "First" that the orders of the Interstate Commerce Commission in Finance Docket No. 13914 are arbitrary and capricious, are not supported

by substantial evidence, are contrary to evidence of record, were made without affording plaintiffs a fair and adequate hearing, and that in making the same the Interstate Commerce Commission exceeded its statutory authority.

II

Admits, for the purpose of this suit, the allegations contained in paragraphs numbered "First" to "Eighteenth", inclusive, of said bill of complaint.

[fol. 135]

III

Denies the allegations contained in paragraphs numbered "Nineteenth" to "Twenty-Third", inclusive, of said bill of complaint.

IV

Admits that the abandonment of the said Yonkers Branch would result in a discontinuance of four stations in the City of Yonkers; that the consent of the Public Service Commission to the discontinuance of said stations and of service on the branch has not been sought or obtained, and denies all other allegations contained in paragraph numbered "Twenty-Fourth" of said bill of complaint.

V

Admits the intention to abandon operations and dismantle electric installations, track and other equipment of the so-called Yonkers Branch, pursuant to authority of the Interstate Commerce Commission, as alleged in paragraph numbered "Twenty-Fifth" of said bill of complaint, and denies all other allegations contained in said paragraph.

VI

Denies the allegations contained in paragraph numbered "Twenty-Sixth" of said bill of complaint.

Further Answering Said Bill of Complaint, the Defendant, The New York Central Railroad Company, Alleges:

VII

That the proceeding in Finance Docket No. 13914 which resulted in the order or orders sought to be reviewed was brought under and was heard and determined in strict ac-

cordance with the provisions of paragraphs 18 to 22 of Section 1 of the Interstate Commerce Act as amended, and [fol. 136] the Rules of Practice before the Interstate Commerce Commission in such case made and provided.

VIII

That a public hearing was held in the City of Yonkers on November 12, 1942, at which time plaintiffs and others were permitted to and did appear, cross-examine witnesses, present testimony and otherwise take part in said hearing.

IX

That upon issuance of Examiner Jordan's proposed report, attached to the bill of complaint as Exhibit C, plaintiffs filed exceptions thereto, and, on March 3, 1943, plaintiffs, except the Public Service Commission, presented oral argument before Division 4 of the Interstate Commerce Commission at Washington, D. C.

X

That the report and order thereafter issued by the Interstate Commerce Commission are amply supported by evidence, were made by said Commission acting within the scope of its statutory authority, and are not arbitrary, unreasonable or in any way unlawful.

XI

That the petitions for further hearing, rehearing, review, reconsideration and reargument, referred to in paragraph numbered "Fifteenth" in the bill of complaint and attached thereto as Exhibits K, L and M, were received and considered by the Interstate Commerce Commission under and in accordance with its statutory powers, particularly paragraph 6 of Section 17 of the Interstate Commerce Act, as amended, and the applicable Rules of Practice adopted by said Commission pursuant to statutory authority; and that the denial of said petitions was not arbitrary, capricious, irregular or in any way unlawful; on [fol. 137] the contrary, said denial was for adequate and sufficient reasons, some of which appear in the answer to said petitions attached to the bill of complaint as Exhibit N.

XII

That plaintiffs were accorded full hearing, are not entitled, as of right, to rehearing, review, reconsideration or reargument before the Interstate Commerce Commission.

XIII

Further answering, defendant denies each and every allegation contained in the bill of complaint, except as herein expressly admitted.

Wherefore, the defendant, The New York Central Railroad Company, hereby prays that said bill of complaint be dismissed, at the cost of the plaintiffs, and for such other and further relief and order as may be proper.

Thomas P. Healy, Harold H. McLean, Attorneys for Defendant, The New York Central Railroad Company, Office & P. O. Address, 466 Lexington Avenue, Borough of Manhattan, New York, N. Y.

[fol. 138] *Duly sworn to by Rudolph P. Ahrens; jurat omitted in printing.*

[fols. 139-140] [File endorsement omitted.]

[fol. 141] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action 21-271

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (STATE DEPARTMENT, DEPARTMENT OF PUBLIC SERVICE), CITY OF YONKERS, and JOHN W. TOOLEY, JR., as President of the Committee of Commuters, a voluntary unincorporated association composed of more than seven members, Plaintiffs,

vs.

UNITED STATES OF AMERICA and the NEW YORK CENTRAL RAILROAD COMPANY, Defendants

Statement of Evidence

Before: Hon. Charles E. Clark, Circuit Judge, Hon. Edward A. Conger, District Judge, and Hon. Simon H. Rifkind, District Judge.

New York, June 2, 1943; 11:00 a. m.

APPEARANCES:

Gay H. Brown, Esq., Attorney for the New York State Public Service Commission; John T. Ryan, Esq., of Counsel.

John J. Broderick, Esq., and Gerard Flannery, Esq., Attorneys for the City of Yonkers.

[fol. 142] Horace M. Gray, Esq., Attorney for John W. Tooley, Jr., as President of the Committee of Commuters.

J. Stanley Payne, Esq., Attorney for the Interstate Commerce Commission.

Robert L. Pierce, Esq., Special Assistant for the Attorney General for the United States.

Thomas P. Healy, Esq., and Harold H. McLean, Esq., Attorneys for the New York Central Railroad Company.

Herman Horowitz, Esq., Attorney for the City of New York.

COLLOQUY

Judge Clark: Public Service Commission of the State of New York v. United States. I suppose this is, as I understand it, a motion for preliminary injunction, or what is it?

Mr. Ryan: Yes, it is a motion for preliminary or interlocutory injunction pending the trial on the merits of the action to set aside an order of the Interstate Commerce Commission.

Judge Clark: Can we find out precisely who the parties are?

Mr. Ryan: My name is John T. Ryan, appearing for the Public Service Commission of the State of New York.

[fol. 143] Judge Clark: Who are the other plaintiffs?

Mr. Broderick: My name is John J. Broderick, and I appear for the City of Yonkers, plaintiff, with Mr. Flannery.

Mr. Gray: My name is Horace M. Gray, and I appear for the Committee of Yonkers Commuters.

Mr. Pierce: My name is Robert L. Pierce; I appear for the United States, your Honor. We are ready to argue the merits today if the plaintiffs are ready.

Judge Clark: You appear for the United States. This is an order of the Interstate Commerce Commission, isn't it?

Mr. Pierce: Yes. The United States is a required defendant in these cases.

Judge Clark: Is there separate counsel for the Interstate Commerce Commission?

Mr. Payne: I am J. Stanley Payne for the Interstate Commerce Commission.

Mr. Healy: Thomas P. Healy and Harold H. McLean for the defendant New York Central Railroad.

Mr. Horowitz: Herman Horowitz. I represent the City of New York. We were a party to the proceeding below and we don't want to unnecessarily burden the action with unnecessary appearances, so may we reserve the right at the conclusion of this hearing, if we deem it necessary, to move [fol. 144] to intervene or perhaps, in the alternative, to ask leave to file an amicus brief?

Judge Clark: Very well.

Anyone else now?

(No response.)

Judge Clark: Now on the proceedings, is there any reason why we can't take up the merits along with the preliminary or interlocutory injunction and hear everything today and try to dispose of it as rapidly as possible?

Mr. Ryan: If your Honor please, I first like to get the consent of the Court for three of counsel who are not admitted to the Southern District to appear here. I think Mr. Healy will present them.

Mr. Healy: Yes. I am a member of the bar of this court and I want to move for the purpose of this hearing the admission of Mr. Ryan, who is a member of the bar of the Northern District, the admission of Mr. Pierce, representing the United States, who is a member of the bar of the Federal Court in the District of Columbia, and Mr. McLain, who is a member of the bar of the Eastern District of Michigan. And Mr. Payne, who is representing the Interstate Commerce Commission, who is a member of the bar of the District of Columbia.

[fol. 145] Judge Clark: I think we can certainly admit you for the purpose of this hearing. Don't you have to have some local man represent you on the record?

Mr. Healy: Yes, I represent the New York Central.

Mr. Gray: I also move their admission. I am a member of the bar of this court.

Judge Clark: Very well.

Mr. Ryan: With respect to your Honor's question as to whether we can dispose of this controversy on the merits today, we have this to say, speaking for the plaintiffs: We are prepared to argue the motion for an interlocutory injunction. We appreciate that the Court from what we have heard would like to dispose of the matter on the merits if possible today. We have some evidence which we would like to present and testimony which we would like to pre-

sent and we are in this position: Some of that testimony or evidence is in documentary form—for example, part of the proceedings before the Interstate Commerce Commission—and we do not have certified copies of it as yet.

Another matter we wish to present is the recent order of the office of Defense Transportation cutting the mileage on omnibus lines by 40 per cent. I have a copy of that order which was furnished me by the ODT but it is not [fol. 146] certified. There are other matters of that kind, but we feel we are willing to go just as far as we possibly can and conclude the case today, and we have witnesses here and we are ready to offer testimony and go just as far as we can on the trial of the merits.

Judge Clark: I should not think the certification of the evidence would be very pertinent. Counsel can see whether they think it is accurate or not. I don't think the formalities will be insisted on.

Mr. Pierce: I think we would be willing to allow the papers to come in subject to further certification.

Mr. Ryan: I think if counsel will agree on this documentary proof, we can dispose of the matter today. At least we can try.

Judge Clark: Is this different evidence from what was before the Commission? In these hearings we usually have additional evidence. Is there evidence in addition?

Mr. Ryan: There is some evidence in addition to the evidence which was received by the Interstate Commerce Commission, and we claim that that evidence is admissible because of the fact that part of it bears upon the jurisdiction of the Interstate Commerce Commission to issue any [fol. 147] abandonment order whatever.

We also claim that the plaintiffs here were denied a fair and adequate hearing before the Interstate Commerce Commission in that they were not permitted to show the changes in conditions occurring after the only hearing in the proceeding at which evidence was permitted to be taken, which was held back in November of 1942. We of course know, and the Court knows, that transportation conditions have materially changed in the meantime and the parties sought an opportunity before final decision was made by the Interstate Commerce Commission to show those changed conditions, and that was refused.

Judge Clark: Perhaps before you go on, is there going to be objection to that line of testimony?

Mr. McLean: Yes.

Mr. Payne: Yes.

Mr. Pierce: Except as to the question of whether or not the carrier is an electric interurban railway, which the Supreme Court has held is jurisdictional, and which they held they can introduce evidence on, we would object to the offer of any testimony except what appears in the record of the Commission.

Judge Clark: I think it would be better if we proceeded right along. I understand there is no objection as to certification. I suggest you start anyway you want, only I may say for myself, I don't know anything about this. I haven't had a chance to see the papers. Then you offer your evidence and the defendants will make the objection, and we will see what we can do.

Mr. Ryan: May I make this suggestion, that we be permitted to argue our motion and after we have argument the Court will be familiar with the case and be in a much better position to understand the case and pass upon the evidence which will be offered. There isn't any too much to offer.

Judge Conger: It will be in the nature of an opening and it will be on the merits too.

Judge Clark: Yes, I should think so.

Judge Conger: Don't be too long.

Judge Clark: That is a good suggestion.

Mr. Ryan: If I am permitted to argue the motion for a temporary injunction, that does involve the merits, and if the other parties are permitted to do likewise, I don't think there will be any need for further argument.

Judge Clark: You go as far as you wish, only today we are going to hear the merits as well as the preliminary injunction. That is the understanding.

[fol. 149] Mr. Ryan: That is the understanding, and we are going to try to complete the trial on the merits today.

Judge Clark: Very well.

Mr. Gray: May I ask your Honor whether we have stenographic notes taken of the evidence?

The Reporter: Yes.

Mr. Ryan: Answers have all been filed. One of them was filed yesterday.

Judge Clark: Judge Conger expresses some concern as to whether you are going to make separate arguments. If that is the case I think you can divide it up between you.

We want to hear everything that is necessary to be heard, but we of course don't want repetition.

ARGUMENT FOR STATE PUBLIC SERVICE COMMISSION

Mr. Ryan: I will endeavor to cover the case generally for the State Public Service Commission, and then for the City of Yonkers. Mr. Gray, representing the commuters, may have some particular points he wants to call to your attention. I don't think they will duplicate anything that has been said.

Judge Clark: All right.

Mr. Ryan: I would like to hand up for the convenience of the Court a map of a certain railroad of the New York Central Railroad Lines. That map is taken from the official [fol. 150] time table of the New York Central Railroad Company, and I think perhaps by looking at it the Court will better be able to follow the argument (handing maps to Court).

If the Court please, this is an application by the plaintiffs for a preliminary or interlocutory injunction, pending final determination of this action, to set aside a certificate and orders of the Interstate Commerce Commission which purport to permit the abandonment by the defendant New York Central Railway of a suburban or interurban electric railway which is owned and operated by the New York Central Railroad Company between the City of Yonkers and the City of New York and to restrain the New York Central Railway from abandoning the line pursuant to the authorization of the Interstate Commerce Commission.

We believe that upon the present application for a preliminary injunction or interlocutory injunction there are but two principal issues involved:

First, have the plaintiffs established *prima facie* that this suit involves substantial questions for determination by the Court upon the merits when it is finally to be decided by the Court whether this line is, to be abandoned?

[fol. 151] Secondly, have the plaintiffs established *prima facie* that irreparable damage will result, in the event that the certificate and orders of the I. C. C. are finally annulled and set aside, after the Court decides this case on the merits, unless the interlocutory injunction is issued?

We believe that our moving papers, which include the entire record of the case before the Interstate Commerce

Commission, present very substantial questions for determination by the Court on the merits and establish a prima facie case for permanent relief. Those substantial questions, without particular regard to the order of their importance, are as follows:

1. That the so-called Yonkers branch is a suburban or interurban electric railway not operated as a part or parts of a general steam railroad system of transportation and consequently that the Interstate Commerce Commission was and is without any jurisdiction whatever to authorize its abandonment.

Subdivision 22 of Section 1 of the Interstate Commerce Act provides that the authority of the Interstate Commerce Commission to authorize the abandonment of railroads does not extend to the abandonment of street, suburban or interurban electric railways, which are not operated as part or parts of a general steam railroad system of transportation. [fol. 152] tion.

Now as to this, we contend:

First, that the Interstate Commerce Commission has failed in its decision to find the facts necessary to support its jurisdiction to enter the order it did in that the Commission failed to find whether or not this line is a suburban or interurban electric railway or whether it is operated as a part or parts of a general steam railroad system of transportation.

Where there is such a lack of the basic findings essential to support an order of the Commission, the Courts have held that it is not the duty of the Federal Courts to search the record to ascertain whether or not the findings it made would have been supported by the evidence, or, rather, whether the evidence was there to support the findings which could have been made. Instead the Courts have held that the proper procedure for the Court is to set aside the order which has been issued without making the essential findings by the Interstate Commerce Commission to support them.

Second, we contend that even if it should be held by this Court that the Commission's findings were sufficient in form to support its jurisdiction to issue the order which it did, such findings are contrary to and are not supported by the undisputed evidence in the record before the Commission. [fol. 153] which is now before this Court.

The Supreme Court held in the Piedmont & Northern Railway Company case that suburban electric railways are those having the following characteristics:

They are of course operated by means of electricity. They are essentially local. They are fundamentally passenger-carriers. They are to an inconsiderable extent engaged in interstate commerce. They transact freight business only incidentally and in small volume. They sometimes link distinct communities, but they are chiefly devoted to passenger traffic and are operated by single or series self-propelled cars. Many of them carry package freight and even mail and some of them even carry carload freight picked up along the line or received for local delivery from connecting steam railroads.

In the case of this so-called Yonkers branch, which the Interstate Commerce Commission has purported to authorize to be abandoned, the undisputed proof before the Commission and this Court shows:

First, that it is operated by means of electricity.

Secondly, that no freight whatever is carried over the line [fol. 154] proposed to be abandoned.

Thirdly, that it is solely a passenger line. Stated in the words of the railroad company's own witness: "You have got a line that's not built for freight. You have got a line that is built primarily for passenger business."

Furthermore, in the record before the Interstate Commerce Commission there is no evidence that the Yonkers Line is engaged in any interstate commerce whatsoever.

The record shows that the Yonkers Line is essentially local and carries passengers between four stations in the City of Yonkers and stations in the City of New York.

It is operated by single or series self-propelled cars. The so-called "MC" or multiple unit cars which require no engines to move them are used and several of them may be operated together in series, that is, several of them may be hooked together.

The undisputed evidence also shows that ordinary locomotives cannot be operated over the line. The New York Central witness expressed this fact in these words: "As I say"—he was referring to the Yonkers branch—"these bridges are too light for a locomotive."

[fol. 155] In the New York Central's return to a questionnaire filed with the Interstate Commerce Commission and

which was made part of the record before the Interstate Commerce Commission and this Court the following statement appears: "The branch was built for the purpose of developing suburban business between the City of Yonkers and the City of New York."

This Yonkers line was electrified in 1926 and again in the words of the railroad witness: "It was expected that a greater number of people having their business in New York City would reside in Yonkers and utilize the electric service to travel back and forth to business."

The cars used on the line were said by the railroad witness to be: "somewhat in the nature of a trolley car" and finally the railroad witness said: "You have got a line that is built primarily for commuter passenger business."

It is admitted that this Yonkers line carries over 600 passengers each way daily at the present time.

Now with these undisputed facts in this record we believe that this Court will find that the line in question is a suburban or interurban electric railway as those terms were used in the Interstate Commerce Act.

[fol. 156] Assuming that the Court finds that this line is in fact a suburban or interurban electric railway, the further question arises as to whether or not it is operated as a part or parts of a general steam railroad system of transportation. Or to state it another way, when is an electric railway to be considered as being operated as a part or parts of a general steam railroad system of transportation as those words are used in the Interstate Commerce Act?

We interpret that language to mean a case where an electric suburban or interurban railway is an integral link in a steam railway system, the construction or abandonment of which would constitute an extension of the steam railroad system of transportation or an abandonment of such steam railroad system of transportation, a link without which the steam railroad's commerce could not be transported to the points where it usually moves.

A good example of a case where an electric interurban railway is obviously operated as a part of a general steam railroad system of transportation may be found on the Hudson Division of the New York Central. That division, as the Court knows, is a part of the line running between New York and Chicago and it passes through the City of Yonkers. It is electrified between New York City and Har- [fol. 157] men and since it runs between New York and

Yonkers, it is interurban but the abandonment of that part of the line between New York and Yonkers would completely disrupt and destroy the commerce moving over the company's general steam railroad system of transportation and destined to the City of New York, and the matter of its abandonment would therefore not be excluded from the jurisdiction of the Interstate Commerce Commission by reason of its being an interurban electric railway.

The Yonkers branch, on the other hand, is not operated as a part of any general steam railroad system of transportation as is evidenced by the fact that although the Yonkers branch electric trains and the Putnam Division steam trains pass over the same tracks between Sedgwick Avenue in New York City and Van Cortlandt Park Junction, the trains of the Yonkers branch cannot pass over the Putnam Division to Brewster, for example, because the Putnam line is not electrified beyond Van Cortlandt Park Junction.

Conversely, steam trains on the Putnam Division cannot pass over the Yonkers branch leading to Getty Square, Yonkers, because the bridges on the electric line will not carry steam locomotives.

[fol. 158] Thus, I think it is evident that commerce normally does not move from the steam line over the electric line.

Furthermore, and this is conceded, if operations over this Yonkers line were to be abandoned as proposed, the Putnam steam division could still continue to operate as it has in the past. The abandonment of operations on the Yonkers line would not interfere with the steam operation on the Putnam Division in the slightest degree.

On the other hand, the steam service could be abandoned on the Putnam Division, which is, we will say, the general steam transportation system, and the Yonkers branch, running from Sedgwick Avenue, New York, to Getty Square, Yonkers, being electrified, could continue in operation the same as it is operated now.

The two lines are operated entirely independently of each other except for the fact that they use the same tracks for a distance of 4.7 miles between Sedgwick Avenue and Van Cortlandt Park Junction.

This fact that both lines operate over the same tracks for a short distance is immaterial, however, because the Supreme Court has held in the Chicago, North Shore and Milwaukee Railroad case, 288 U. S. 1, that mere physical con-

nection on an electric railway with a steam railway, the in-
[fol. 159] terchange of traffic with one or even the use of
some eight miles of the track owned by a general steam rail-
road system of transportation does not take an interurban
electric railway out of the exception provided by subdi-
vision 22 of Section 1 of the Interstate Commerce Act.

In that Chicago & Milwaukee case which I mentioned an
interurban electric railway was held not to be subject to the
jurisdiction of the Interstate Commerce Commission al-
though it operated in interstate commerce, it had 138 route
miles of line extending all the way from Chicago, Illinois, to
Milwaukee, Wisconsin, it had a branch line which was 36
miles long and it operated 20 fast through passenger trains
a day, it had Pullman and dining car service on its fast
trains, and sold through tickets to all points in the United
States, Canada and Mexico, it connected with four steam
railroads at thirteen different points and, as I said, it used
the tracks of a steam railroad for a distance of eight miles.
It even interchanged carload freight with steam railroads,
and it owned 114 freight cars having no electrical equip-
ment whatever on them and they were interchangeable with
steam railroads. In addition, it participated in over 1000
freight tariffs either as initial carriers or as delivering or
[fol. 160] intermediate carriers.

Since the Supreme Court has held that such an electric
railway was not subject to I. C. C. jurisdiction and the
statute has not since been changed, it is rather difficult to
conceive just how the Interstate Commerce Commission
ever got the idea that it had jurisdiction to authorize the
abandonment of this little Yonkers branch.

Judge Clark: What case is that?

Mr. Ryan: Chicago & Milwaukee.

Judge Clark: Doesn't the financial situation have some-
thing to do with it?

Mr. Ryan: It has nothing to do with the question of
whether or not it is an interurban electric railway. It will
have something to do with the validity of the order assum-
ing that it is not an interurban electric railway, and I will
come to that in a moment.

Judge Clark: Is that definitely the holding of the Su-
preme Court cases? You might think as a practical matter
that a heavy drain on a system financially would be an in-
terconnection that would be of importance. But I think
that your point is that under these precedents the statute

refers merely to physical things and not to financial things or business setup. It refers to operating physically.

[fol. 161] Mr. Ryan: It has to be an essential link in a general steam railroad transportation system and if it is not that, then the Interstate Commerce Commission hasn't any jurisdiction to authorize it abandoned if it operated at a loss of ten million dollars. Congress just has not given it that right and for a very good reason,—it wanted to see to it that essentially local transportation should be left in the hands of the State where it belonged, and it did not desire to give that power to the Interstate Commerce Commission.

Judge Clark: I suppose that is true in history. That is the way it started, but I had rather thought that there is a good deal of view that interstate and intrastate are pretty well connected. Doesn't that go back to the decision of Justice Hughes, the Minnesota rate cases, 30 years ago? Of course you have got a statute which possibly has not been construed, but I should think financial interconnection might be as important as physical interconnection.

Mr. Ryan: Perhaps your Honor may so find after examining the cases, but I am at the present moment unwilling to agree that that is the test.

Judge Clark: I see. Very well.

Mr. Ryan: The uncontroverted evidence here shows that [fol. 162] this Yonkers branch is entirely intrastate and it does not pass beyond the confines of two adjoining cities and that it may be and actually is operated entirely independently of any steam railroad system of transportation, except for the use of tracks of this Putnam Division, which circumstances the Supreme Court has held to be immaterial.

Now the mere circumstance that this Yonkers line happens to be owned by the New York Central Railroad system, which also owns and operates a general steam railroad system of transportation, is likewise immaterial to the question to be decided here, that is, the jurisdictional question. This would perhaps be more readily apparent if this Yonkers line happened to be so located that it did not actually join or connect with any of the steam lines owned by the New York Central.

However, if the fact of ownership by a steam railroad company were intended by Congress to be the test of whether the Interstate Commerce Commission was to have

jurisdiction over an electric railway, the statute would have provided that the Interstate Commerce Commission was to have jurisdiction over electric railways in cases where they were owned and operated by a railroad which also owned and operated a general steam railroad system of transportation. This the statute does not do.

We say that the test actually laid down by the statute has nothing to do with the question of ownership. The test is whether the line in question is an essential link, an integral part of a general steam railroad system of transportation, no matter who happens to own or operate that general steam railroad system.

The Yonkers branch is not an essential link and the mere fact that it happens to be owned by the New York Central or operated by it cannot or does not in our opinion change or alter this fact.

I believe that the facts which have already been discussed clearly demonstrate that the Interstate Commerce Commission had no jurisdiction whatever to issue this abandonment order. But if we assume for the sake of argument, however, that it did have jurisdiction of the subject matter and that the line in question is not an electric railway, we come to another point which your Honor has mentioned and upon that point we urge that the Interstate Commerce Commission's order should be set aside because as a matter of law the evidence before the Commission was insufficient to support the conclusion it reached to the effect that the continued operation of this purely intrastate line would result in an undue burden upon interstate commerce.

Now since this electric line in question is purely an intrastate line, the only way the Interstate Commerce Commission could conceivably get any control over it at all would be if it would find on sufficient evidence that its continued operation would unduly burden interstate commerce.

This of course follows because under our Constitution the regulation of intrastate commerce is left to the States and only the regulation of interstate commerce is given to the Federal Government.

That this distinction still has some real meaning was recently reaffirmed by the Supreme Court in the case of *Palmer v. Massachusetts* in 308 U. S. There the United States District Court of Massachusetts had permitted the abandonment of an intrastate railroad line without any application for its abandonment having been made to the regula-

tory Commission of the State. The District Court authorized the abandonment in the exercise of the power it believed it had under Section 77 of the Bankruptcy Act which gave the Court exclusive jurisdiction over the debtor and his property, wherever located.

[fol. 165]. The Supreme Court, however, held that the District Court did not possess any such power to abandon a line without the consent of the State Regulatory Authority and pointed out that the right of a State to regulate its own local commerce was a right which must be respected not only by the Interstate Commerce Commission but also by the Federal Courts themselves.

The sole basis that can be claimed by the Interstate Commerce Commission in this case to support its conclusion that a continuance of the operation of this Yonkers line would unduly burden interstate commerce is its finding that in the test period selected by the Commission the line was operated at a loss of \$56,000 a year. We assert, that assuming such a loss did occur in the operation of this line, that fact alone is not sufficient upon which to base a finding that an undue burden on interstate commerce would be caused by its continued operation.

It is not the law now and it never has been the law that a railroad is entitled to make a profit on each and every line or train that it operates. This principle was laid down by the Supreme Court in the Atlantic Coast Line case and has been consistently adhered to ever since.

[fol. 166] We claim that the Interstate Commerce Commission in this case completely and erroneously ignored the effect of such decisions. It simply considered the operations on the branch line alone as though that was all there was to the case and paid no attention whatever and made no finding as to the fact that the New York Central system as a whole is making greater profits at the present time than it has ever made at any time in its whole history.

In 1942, for example, the New New York Central had a net profit after payment of all expenses, taxes and fixed charges of over \$4,000,000. In the first quarter of 1943—and these facts appear in the affidavit submitted in support of this motion—in the first quarter of 1943 it had a net profit of more than \$16,000,000 as compared with a net of only \$4,000,000 in the first quarter of their banner year of 1942. In other words, in 1942, in the first quarter, their net was four times what it was in the banner year 1942.

Now whether or not a given loss constitutes a burden on interstate commerce is a relative question and must be considered by the Interstate Commerce Commission in relation to the earnings on the operations of the system as a whole. This the Interstate Commerce Commission, we say, illegally [fol. 167] and erroneously failed to do.

I suppose we could all agree that a two-pound weight would prove a staggering burden if it had to be carried by a small child just able to walk; whereas an adult in good health could carry it without any effect on his ability to move around whatsoever. So it is with a railroad system and a loss on a branch-line. If the railroad is making heavy profits on its operations as a whole, including the branch which is being operated at a small loss, then the existence of the small loss on the branch cannot legally be said to unduly burden such a carrier.

Anyone who is familiar with the complicated subject of railroad rate-making on a system the size of the New York Central, where you have a railroad company having a larger investment in property than the whole New York Telephone Company and all of the Consolidated Edison System Companies put together, knows that as a practical matter a change in revenues or expense of \$50,000 wouldn't make any difference whatever in the rates to be charged by such a company. Nor would it interfere in any substantial way whatsoever with the ability of such a company to carry on its interstate commerce. Here the Interstate Commerce Commission erroneously measured the burden on interstate [fol. 168] commerce by assuming, contrary to the evidence, that the loss had to be carried by the Yonkers branch itself instead of by the prosperous carrier that the New York Central is at the present time.

Let me illustrate how small this loss of \$56,000 really is when a question of rates is being considered. In a rate case we had with the New York Central before the Interstate Commerce Commission last summer the vice-president and comptroller of that company testified before that Commission that in his opinion an erroneous depreciation charge amounting to four and a half million dollars entered in the company's expenses in 1941 was too small in amount to bother correcting the accounts for as it was too small in amount to distort the expense-account of the company for rate-making purposes in that year. And the funny part of it is he was probably right about it because such a change

is so small when related to the billion dollars of rate base that you use in such cases that you couldn't even find the effect of the difference.

Judge Clark: Of course, I suppose you have to take into consideration that this is a fairly small line. As I understand it, it is three miles.

Mr. Ryan: The part that was to be abandoned was three miles, yes, sir.

[fol. 169] Judge Clark: That makes over \$15,000 loss a mile. I suppose you will bring that out. I take it that the community is not left entirely without services. Is it? How about this other steamboat that goes up not so very far away where the Putnam Division is?

I suppose the Commission would have to weigh those matters. It is the Commission's job of course in the main, and not ours.

Mr. Ryan: Let me say this: It is the Commission's job to weigh this question of convenience and necessity. It is the Commission's job, and I concede that where it has substantial evidence to arrive at the decision after weighing the question of convenience and necessity, this Court has no power to interfere with its decision. But the Court has laid down factors which the Commission must use in weighing the various complicated elements, and one of them is—

Judge Clark: One of them certainly is the loss.

Mr. Ryan: One of them is the loss, of course. But another of them, we say, the Commission completely ignored, and that is, what kind of carrier is being asked to absorb the loss? Is it a carrier which is operating its whole system at a loss? Or is it a company like this one which is operating at the greatest profit it has had in its whole history?

Now we say those are facts which the Supreme Court has said the Interstate Commerce Commission must consider and we say in this case did not consider and consequently it has failed to comply with the law. We are entitled to a decision of the Interstate Commerce Commission upon that question, and we haven't had it, and until we get it, its order should be set aside.

Judge Clark: Now you say it was not given any consideration. What is that based on? The fact that in its findings and orders it did not mention it?

Mr. Ryan: Yes, the findings are based upon the fact —

Judge Clark: I presume these are rather obvious things you are speaking about, including the wealth of the New York Central. I assume the Interstate Commerce Commission must have had that in mind, but they don't discuss it in their findings.

Mr. Ryan: They do not make any findings with respect to the earnings, and as I will point out later, they did not consider the changed conditions which occurred.

Judge Clark: Where among all those various documents do you find the Interstate Commerce Commission's findings?

[fol. 171] Mr. Ryan: It is attached to the complaint as Exhibit I. That is the decision which was made by Division 4 of the Interstate Commerce Commission.

Judge Clark: Very well.

Mr. Ryan: We claim that the Interstate Commerce Commission cannot find an undue burden upon interstate commerce exists unless it can show that the operation of an intrastate line at a loss materially affects in some measurable way the overall ability of an interstate commerce carrier to carry on its interstate commerce business. We say that such proof does not exist here, and consequently the Interstate Commerce Commission had no business authorizing the abandonment of this intrastate line and its attempt to do so should be set aside and annulled by the Court.

Now the third ground that we urge as justification for this Court's setting aside this order of the Interstate Commerce Commission in this case is that the I. C. C. failed to grant the opponents of the railroad a fair and adequate hearing as it was required to do by statute. The denial of a fair and adequate hearing occurred when the I. C. C. denied plaintiffs' applications for a further hearing or a rehearing which was filed with the Commission in April of this year. These requests for a rehearing or a further hearing were [fol. 172] made at a time prior to the time when the whole Commission finally made its decision on the railroad's application. The original and only hearing in the proceeding before the Interstate Commerce Commission at which an opportunity to present evidence was given was held back in November, 1942; some seven months ago, and we make no complaint whatsoever as to the fact but what a fair hearing was given on that date.

The conditions materially changed, however, between the date of the original hearing and the time when the further hearing was requested and the plaintiffs, we claim, should have been permitted to show the effect of the changes on the railroad's application to abandon this line.

The evidence the Interstate Commerce Commission erroneously refused to provide an opportunity to present, we claim, was:

First, evidence of the fact that the City of New York intended to extend its Broadway-Lenox Avenue subway to the terminus of the Yonkers branch at Sedgwick Avenue, it appearing that this branch line had been in successful operation in years prior to the time that the Sixth and Ninth Avenue El's were abandoned, those elevated lines, of course, [fol. 173] being connected with this Sedgwick Avenue branch of the New York Central system.

Instead of affording the plaintiffs an opportunity to submit proof on this important question, the Interstate Commerce Commission improperly and erroneously accepted the mere statement of an assistant New York City Corporation Counsel that in his opinion the City would not build the extension.

We further claim that the Interstate Commerce Commission illegally refused to provide an opportunity to present evidence to the effect that the City of Yonkers intended to reduce the City tax assessment on the Yonkers branch, which of course would have the effect of reducing the expenses of the New York Central in operating the branch.

Finally, we claim that the Interstate Commerce Commission erred in refusing an opportunity to the plaintiffs to present evidence as to the changed conditions with respect to the availability of alternative transportation facilities due to the drastic curtailment by the United States Government of gasoline and rubber for transportation purposes, all of which occurred subsequent to the date of the hearing which was held some time in November of last year.

[fol. 174] We contend that all of this evidence was material and was relevant upon the question at issue and we contend that the failure of the Interstate Commerce Commission to hold a hearing to receive it constituted reversible error as a matter of law.

In conclusion I would like to say to this Court that the principles involved in this case are very important to the State of New York, whose right to regulate its local com-

merce has been invaded; and they are important to these six or eight hundred daily commuters who may lose their means of transportation to and from their work, and they are important also to the City of Yonkers, which will suffer, according to the evidence, which is uncontradicted, a depreciation of property values in the areas now served by the line of approximately 10 per cent.

The irreparable damage to the plaintiffs in the event they are finally successful in setting this Interstate Commerce Commission order aside and if the railroad is abandoned in the meantime is apparent, and so we respectfully request this Court to grant a preliminary injunction, if it finds it necessary to do so, in order to preserve the status quo prior to the time when it gets ready to render its final decision in this matter.

[fol. 175] Mr. Gray: If the Court please, I will only take a few moments.

Judge Clark: Now you represent—

Mr. Gray: I represent the Yonkers Commuters Committee.

Judge Clark: Very well.

ARGUMENT FOR YONKERS COMMUTERS COMMITTEE

Mr. Gray: I will merely touch on the points which your Honor has raised during Mr. Ryan's argument.

The financial interconnection your Honor suggested might have something to do with the jurisdiction of the I. C. C. over this line. I will not add to Mr. Ryan's answer to that, which I think is complete. What I do wish to point out is, assuming that there is a \$56,000 operating loss, that is not a complete loss in itself because that operated to reduce the Federal income tax by at least \$22,000 that the railroad would have had to pay otherwise, and perhaps much more than \$22,000 depending upon the bracket of excess profits tax that this \$56,000 would finally have found itself in.

Furthermore, the City of Yonkers, that is, the majority of the common counsel and the City manager, have expressed their willingness and consent that the assessment on this right of way within the City of Yonkers be reduced to a nominal amount on the ground that if it is not paying, [fol. 176] if it is not being operated profitably, it has no intrinsic value, and that would result in reducing their tax by nearly \$20,000.

Now we take off \$22,000 and we take off another \$20,000 and now we have a tax bill that the railroad says they have to pay the City of New York in the amount of \$11,000 for just running through Van Cortlandt Park. The record is not clear whether this \$11,000 is assessed on a mileage basis on all of the trackage in the City of New York or whether it is actually on an evaluation within Van Cortlandt Park. If it is based upon the valuation, the railroad, I think, with the proper efficiency could have that reduced to a large extent on the ground that it is confiscatory—they get nothing for the taxes they pay.

So that brings a deficit, as they say, to an amount that almost we could stand ourselves personally.

Now the record also shows that the tickets are interchangeable between the Hudson River Division up as far as the City of Yonkers on this Yonkers branch. And the record does not show how many of those tickets have been bought to, say, Yonkers or Ludlow on the Hudson River Division, which are also used on the Yonkers branch by these same travelers, with the result that their figures \$56,000 are subject to a great deal of diminution.

[Vol. 177] Now that also applies, I think, your Honors, to the suggestion that they were losing \$15,000 a mile. We want to remember too that this line was acquired by the New York Central system voluntarily. At the time they took it over it was a competing line, and our position is that a railroad may not absorb a competing line operated so inefficiently that it shows a loss and thereby confer jurisdiction upon the Interstate Commerce Commission contrary to the local and, we say, exclusive authority of the Public Service Commission of the State.

Judge Clark: I suppose they acquired quite a lot of those.

Mr. Gray: Yes. It ran up between 1885 and 1918.

Judge Clark: There is a lot of railroad history since then.

Mr. Gray: Yes, sir.

Judge Clark: I shouldn't think that what they did back then would count so very much.

Mr. Gray: I think a railroad man is far-sighted.

Furthermore, this line was not operated at a loss up until 1936 or 1937 because the Sixth Avenue and Ninth Avenue Els operated as a feeder, and when the Sixth and Ninth Avenue Els were discontinued in 1937 and 1938 a large

[fol. 178] amount of their traffic fell off. But that is going to be restored by the extension of the Lenox Avenue-Broadway subway going right through on the same tracks and up to the I. R. T. Lexington Avenue line.

Now we can't take a financial statement of one particular short period and apply it to a long range decision on the line. These various railroads and other utilities have certain cycles of prosperity and loss. The New York Central Railroad itself had a loss in 1938 of \$20,000,000. It would have been ridiculous to assume that they could go to the Interstate Commerce Commission and discontinue their system because they were running at a loss. The Yonkers branch apparently has reached a low and it has started to come up again because the record shows that their traffic is now increasing, and back in November it already increased by nearly 3 per cent. But when you find that there is an upswing at a time when gas and rubber are so short and we are in such a critical period, and when we have lines that are already established which can be operated cheaply, the rails are all there, and all it needs is a few men to run the cars and to have things so that they will operate, it seems to me that the Interstate Commerce Commission went be- [fol. 179] yond the realm of good judgment and into the realm of arbitrary thinking in cutting out such a line in such an emergency.

ARGUMENT FOR CITY OF YONKERS

Mr. Broderick: I appear for the City of Yonkers.

Judge Clark: You are giving up all taxes? Is that it?

Mr. Broderick: This is the first time I have appeared in Statutory Court and I am kind of overawed by the power of the Court and the magnificence.

Judge Clark: We are just a branch of the United States Government, and you are fighting the United States Government on a different level, so you don't want to be overawed.

Mr. Broderick: I am just a country lawyer from up-State. I have listened to Mr. Ryan's argument and he subscribes to what we think about this case.

The first point raised is on the question of jurisdiction. Now, as I read the cases and read the statute, the Interstate Commerce Commission has no more jurisdiction over this road than it has over an ordinary street railroad running through the City of Yonkers.

And the second point is on the question of this being a burden to interstate commerce. Well, Mr. Ryan has covered that, and I don't think this \$56,000 is too much of a [fol. 180] burden on the New York Central Railroad Company.

Judge Clark: How are you going to make sure that you are going to remit taxes? Don't political conditions ever change in Yonkers?

Mr. Broderick: Here is the situation, if your Honors please—

Judge Conger: Nobody understands the political conditions up there.

Judge Clark: Not even you?

Judge Conger: Neither I nor anybody.

Mr. Broderick: I am glad you brought that up because the railroad would probably ask my witness that if I put him on the witness stand. I have had very amicable relations with the New York Central Railway and so has our assessment department, and everytime they asked for an assessment reduction they got it. In this case Mr. Lewis, who is their land tax agent, did not ask for a reduction, and we are willing to grant this reduction because we believe that the value is not there, that it has been over-assessed like other branches of the New York Central within the City of Yonkers. And this reduction will amount to a saving of \$9000 and the expenses of the New York Central Railroad Company will be reduced and of course it will reduce their [fol. 181] deficit.

You see, I live in the City of Yonkers and was born there, and while this might not be relevant to the issue, we don't like to see the Putnam Railroad being discontinued. The City of Yonkers has grown up around the Getty Square branch of the Putnam Division of the New York Central, and it would be a hardship to the city. The Getty Square branch runs right into the hub of the business center of the City of Yonkers.

Judge Clark: I haven't had a chance to look at the decision, but it would seem to be indicated that a suitable amount of other forms of service existed. Some of these means of transportation have had to go in a good many places. It is hard on the communities, but if you have other forms of service I suppose it would—

Mr. Broderick: I am glad you brought that up, if your Honor please, because Mr. Ryan has introduced an order in

evidence—not in evidence, but for the consideration of the Court, and we have submitted an affidavit in relation to the change in the bus situation in the City of Yonkers. Under this new order of the Government, the bus mileage has to be cut 40 or 20 per cent. Now the City of Yonkers is operating on its full capacity. Mr. Pollock has an affidavit to that effect. And this is not the time to allow the abandonment [fol. 182] of this railroad on account of the conditions which now exist in the City of Yonkers.

Judge Clark: How far would you think that would be a question for us? That is, assuming the Interstate Commerce Commission had jurisdiction generally if you were to have any modifications along that line to meet the temporary emergency, isn't that a matter for the Commission?

Mr. Broderick: We tried to bring that up on the rehearing, but they wouldn't allow us to go in on that. That is what we petitioned for on the rehearing, and they didn't allow us the rehearing, and they decided without giving us an opportunity to introduce that evidence at the rehearing.

In addition to that, if your Honors please, I want to say this in conclusion, that we have exhausted all our remedies. We have gone before the Interstate Commerce Commission and we asked for a rehearing and this is our last remedy, and the record shows that we will be very greatly damaged, and I think to the extent of \$2,700,000 in the loss of value, and we say on account of the whole case the Interstate Commerce Commission did not give that situation consideration in view of the small loss to the New York Central Railroad Company in operating this line.

[fol. 183] Judge Clark: Anyone else of the moving parties?

(No response.)

Judge Clark: If not, we will hear from the Government.

ARGUMENT FOR UNITED STATES

Mr. Pierce: May it please the Court, this is a suit to set aside an order of the Interstate Commerce Commission which was issued under Section 1, Paragraphs 18 to 22 of the Interstate Commerce Act, which, as plaintiffs have told you, permitted the New York Central to abandon its so-called Yonkers branch. These provisions of the Act forbid railroad carriers subject to the Interstate Commerce Act to abandon any portion of their line without a certificate

of public convenience and necessity from the Interstate Commerce Commission.

From the Commission's report, which is of course attached to the pleadings here, it appears that the New York Central has three closely parallel lines extending from or through Yonkers and also a fourth line which is known as the Harlem Division, which extends east of the City of Yonkers. On each of these three lines through Yonkers there are four or five stops within the City of Yonkers. There is first to the west on the map here the so-called Hudson Division, which is the main line west, which south of Yonkers stops at High Bridge and University Heights and runs on into Grand Central Station. To the east of [fol. 184] the Yonkers Division is the Putnam Division, which runs through Yonkers and then through High Bridge and University Heights to a terminal at Sedgwick Avenue in New York.

The Yonkers branch, whose abandonment the Commission here authorized on the carrier's application, is an electrified branch running parallel between these two lines for a distance of 3.1 miles. It has four stops in Yonkers which vary from 0.3 to 0.9 of a mile distance from the nearest station on another one of these lines. It runs south from Getty Square in Yonkers and connects with the Putnam Division at Van Cortlandt Park Junction. Through the Putnam Division, its passengers may be transferred to the Hudson Division at High Bridge and at University Heights. The Yonkers branch carries no freight and most of its passengers, as the Commission points out, are commuters between Yonkers and Grand Central Station. Passenger service is rendered over the line by 2 to 4-car trains which run from Getty Square to the connection with the Putnam Division at Van Cortlandt Park Junction, thence down that division through University Heights and High Bridge to the terminal of the Putnam branch at Sedgwick Avenue.

The Commission's order would permit abandonment of the Yonkers branch operations from Getty Square to Sedgwick Avenue, which is a distance of 7.8 miles. [fol. 185] However, the only actual physical abandonment would be of the 3.1 mile segment to Van Cortlandt Park Junction. In the past few years while there has been some local traffic on the Yonkers branch, most of the passengers have transferred at High Bridge or University Heights to the Hudson Division for the ride into Grand Central Station. A smaller

number rode the Yonkers branch train to Sedgwick Avenue. From there, prior to the recent abandonment of the Sixth and Ninth Avenue Elevateds, the passengers had direct service on the Elevated to downtown New York. Passengers at Sedgwick Avenue now must use the shuttle to 155th Street and then take the Eighth Avenue subway downtown.

The Commission found that there had been a steady dropping off of business on the Yonkers branch until it was only about 25 per cent of what it was 12 years ago. It pointed out that improved alternative methods of transportation between Yonkers and New York, and the abandonment of the Sixth and Ninth Avenue Elevateds, had contributed to this loss of patronage. It was found that while the commuter traffic on other divisions of the New York Central had increased nearly 12 per cent during the past year, that [fol. 186] on the Yonkers branch it had increased only 2.87 per cent, and that there was nothing to indicate that any substantial increase would be experienced in the future.

Weighing the average income derived from this branch in 1940 and 1941 against the expenses of operation, the Commission found that the estimated annual loss to the carrier from the operation of this 3-mile line branch would be about \$56,941. In reaching these figures the Commission credited the line with all revenue not only earned from local passengers, but with all revenue earned by the system on passengers originated by the line and continuing on to downtown New York on other branches. The Commission found that there were alternative methods of transportation to downtown New York for commuters relying on the Yonkers branch. Thus it was found that they could take a bus to stations on the nearby Hudson Division, and then the Hudson Division trains downtown, or they could take a Broadway trolley from Getty Square to various subways, and then take the subway downtown.

The president of the bus company in question testified before the Commission, and the Commission so finds, that his company would put on two additional buses which he believed would accommodate additional passengers resulting from an abandonment of the line. And the Commission found that the traffic on the trolley line was light, that is, the line serving Getty Square, and that substantially more passengers could be accommodated by it without difficulty.

The Commission concluded then that the line was being operated at a substantial loss and that there was no prospect of more favorable results for the future, that continued operation would impose an undue burden upon interstate commerce and the New York Central and that the present and future public convenience and necessity would permit the abandonment of the Yonkers branch.

A twofold attack is made upon this order. First it is said that for several reasons the Commission lacked jurisdiction to permit this abandonment and that its action interferes with the jurisdiction of the New York Public Service Commission over intrastate carriers.

Secondly, it is said that the Commission abused its discretion and denied plaintiffs a fair hearing by refusing to grant a petition for rehearing to enable plaintiffs to introduce certain newly discovered evidence alleged to be material.

It is contended that the Commission had no jurisdiction, first, because the Yonkers branch is located wholly in New [fol. 188] York State and carries only intrastate passengers. It is further suggested that the Commission's order illegally interferes with the jurisdiction of the New York Public Service Commission, whose consent, it is said, is required by statute for the discontinuance of stations in intrastate operation. But the language of the Interstate Commerce Act makes it clear that the Commission had jurisdiction and that the New York Public Service Commission must bow to the dictates of the federal agency. Thus Section 1, paragraph 18, requires a carrier subject to the Interstate Commerce Act to secure the Commission's approval before abandoning any portion of its line. Obviously the New York Central is an interstate carrier subject to the Commission's jurisdiction, and of course equally obviously, the Yonkers branch is a portion of its line.

Furthermore, Section 1, paragraph 20, of the Act provides that when a carrier has secured a certificate from the Commission it may abandon "without securing any approval other than the certificate." This clearly indicates without question that Congress intended to make the jurisdiction of the Commission exclusive.

[fol. 189] The Supreme Court also in two cases has held that the Commission has jurisdiction to authorize the abandonment of intrastate operations on a branch located

entirely in a single state, when they are carried on by an interstate carrier, and when the operations are found to burden interstate commerce. I refer to *Colorado v. U. S.*, 271 U. S. 453, and *Transit Commission v. F. S.*, 284 U. S. 360.

The Court in these cases emphasized that this is merely an example of the well established Federal power to regulate intrastate commerce to prevent injury to interstate commerce, and that under such circumstances the local power and local regulatory agencies must yield to the Federal power. This is the same power that the Supreme Court recognized in these cases which the Commission has over intrastate rates and which was recognized in the Minnesota rate cases.

The only case in which the Supreme Court has recognized that the Commission has no jurisdiction over intrastate abandonments is where a line located in a single state seeks to abandon its whole line. That was in *Texas v. Eastern Texas Railway*, 258 U. S. 204. There, of course, where a line is not part of an interstate branch, once the interstate operations have ceased, there can be no interstate commerce [fol. 190] to be burdened.

That clearly is not this case, and the Commission has recognized in a number of cases, as it did in effect here, the distinction between that situation and the abandonment of a single intrastate branch by an interstate carrier.

It is said too that because the New York Central's operations, taken as a whole, are profitable, the unprofitable operations on the Yonkers branch could not as a matter of law result in burdening interstate commerce and for this second reason the Commission had no jurisdiction. But both the Commission and the Courts have consistently recognized that such a condition does not prevent the authorization of abandonment of unprofitable operations. Otherwise the absurd result would follow that no prosperous carrier could ever abandon any portion of its line, although the Commission permits such to be done every day in the week.

In both the *Colorado* and the *Transit Commission* cases the Supreme Court plainly recognized that the carrier as a whole was prosperous and that abandonment of the local branch was not necessary to enable the carrier to earn a fair return on its entire investment. It is recognized by these [fol. 191] and numerous other decisions of the Courts that public convenience and necessity is a factual question pecul-

iarly for the Commission's discretion. The Commission must weigh the disadvantages to a local community and intrastate commerce from an abandonment against the burden which continued operation will throw upon interstate commerce. Under the decisions if it does so and there is a rational basis from the findings for its conclusion and substantial evidence to support it, the Courts cannot interfere. Here the Commission has done just that. It has weighed the two considerations and there is a rational basis for its ultimate conclusion that the injury to the carrier from continued operation outweighs the injury by abandonment to the communities served. Thus, the Commission found that there were good substitute facilities available to take care of this traffic so as not to injure the commuters too much, whereas continued operation of this small branch would result in a loss to the carrier of nearly \$57,000 a year.

We submit these are adequate findings which afford a rational basis for its ultimate conclusion that public convenience and necessity would permit this abandonment.

[fol. 192] Judge Clark: What do you say to the point that in view of the recent restrictions on bus service, this temporary condition, that it should not be abandoned at the moment? I see here an affidavit made by a bus company.

Mr. Pierce: I was going later to go into that, but I will take it up now.

Our position is that in the petition for rehearing the plaintiffs did not mention specifically what evidence they intended to put in with respect to the bus services. They merely said that deteriorating conditions had resulted. The Commission must have taken that into consideration in November of 1942 at a time when the impact of these factors had already been felt. Furthermore, the Commission points out that there were other routes besides the bus line, such as streetcar lines.

Judge Clark: Would that be a matter for the Interstate Commerce Commission?

Mr. Pierce: Ordinarily it is completely for their discretion, and the Courts have recognized that when petition for rehearing is made.

There is, of course, an exception, which I will mention.

Plaintiffs also argue that the Yonkers branch is not within [fol. 193] the Commission's jurisdiction because of an exemption contained in Section 1, paragraph 22. That section exempts from the Commission's abandonment power, street

suburban or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation. The frivolousness of this contention is illustrated by the fact that plaintiffs never raised it before the examiner or in their exceptions to the examiner's report. Only in the petitions for rehearing is this objection made. Unquestionably, this accounts for the fact that there is no discussion of this issue in the Commission's report.

The Supreme Court has held in *Idaho v. U. S.*, 298 U. S. 105, that this question is a jurisdictional factual issue upon which a district court may take evidence de novo. For that reason we cannot well object here to the putting in of new evidence on this issue. However, no amount of evidence can establish that this line, even if it be considered merely an interurban electric, is not operated as part of a general steam railroad system of transportation and is thus within the exemption.

Not only is this line owned by the New York Central, but it connects with other lines of that carrier, that is, with [fol. 194] the steam branch of the Putnam Division, and it transfers a great many of its passengers, the bulk of them, to the Hudson Division, which is the carrier's main line west and main line into Grand Central.

On much less convincing evidence the Commission has frequently and recently held that electric lines were operated as part of a steam railroad. I refer the Court to *New York, Westchester & Boston Railroad*, 218 I. C. C. 255; and *Lorain Street Railway*, 237 I. C. C. 72, where electric railways were held to be operated as parts of a steam railroad system, even though they were actually owned by a corporation separate from, though dominated by a steam carrier financially. The Commission has to make a great many of these determinations because there are other statutes, such as the Railway Labor Act and Railway Retirement Act; so there is quite a body of law on it.

The plaintiffs have mentioned the case of the Chicago North Shore Line. I think it is correct that the Court held it was within a similar exemption proviso. In that case, as I recall it, the Supreme Court's decision is grounded primarily on the fact that they were there considering the validity of certain bonds which had been issued by the carrier and that for it to reverse the Commission would be unfair to the bondholders. Subsequently, however, I believe—and I will submit this to the Court later—the

Commission reconsidered under some of these later acts the status of the Chicago North Shore & Milwaukee and found that it is not merely an interurban electric but is operated as a general steam railroad system of transportation, and the decision has been sustained by three judge Federal Courts.

Certainly we believe this branch can scarcely be considered an electric interurban. The Commission has held another of these primarily passenger-commuter lines to be more than a mere interurban, namely, the Hudson & Manhattan, and its conclusions have been sustained by this Court in *Hudson & Manhattan Railroad v. Hardy*.

Finally it is said that the Commission abused its discretion and denied plaintiffs a fair hearing by refusing to grant plaintiffs petitions for rehearing. Plaintiffs presumably rely upon the outstanding case, the *Santa Fe* grain rate case in 284 U. S. 248. There the Supreme Court held that the Commission deprived carriers of a fair hearing when it refused a rehearing to show a cataclysmic decrease in carrier revenues from the late depression, and consequently set aside its order and fixed the grain rates in [fol. 196] the western district. But that order recognizes that ordinarily the grant or denial of a petition for rehearing is within the Commission's sound discretion, and so long as the Commission does not prevent the showing of changed conditions which are clearly material to the Commission's consideration, its discretion will not be interfered with. Here the newly discovered evidence as to certain allegedly changed conditions was not as to changes which were so material as to affect the result, and the Commission, we believe, properly denied the petitions for rehearing. It was alleged, first, in this petition that the plaintiffs would introduce evidence that the City of New York planned after the war to build a subway extension so that passengers from the Yonkers branch would have a direct connection to downtown New York at Sedgwick Avenue as they had had in the days of the Ninth Avenue Elevated and Sixth Avenue Elevated. But as the carrier pointed out in its answer to the Petition, even if the days of the Ninth Avenue El were restored, the \$57,000 deficit of the Yonkers branch would only be pared by some \$9000. Furthermore, the City of New York, which appeared before the Commission and also is here in support of the abandonment, pointed out that this project was so far from realiza-

[fol. 196a] tion and dependent upon so many post-war contingencies that it had not even been brought to the attention of the City's law department. It was urged too by plaintiffs that they would show that the City of Yonkers would reduce the carrier's taxes, property taxes. But this change, according to their own estimates, would only have cut some \$8000 from the carrier's deficit in running this branch. Consequently, neither of these alleged changes, even if they might cut something off of the deficit, would have contradicted the Commission's conclusion that the line was still being run at a substantial loss. Whether the particular figure is \$57,000 or some smaller amount is not material, for the Supreme Court has recognized in the Transit Commission case that the Commission need not determine the extent of the burden with mathematical exactness. These were changes not of substance, but rather only of degree. It was said in the petitions too that subsequent evidence would show that the carrier's overall net income for 1942 had increased. But this again was merely a change in degree and not in substance; for in the years 1940 and 1941 upon which the Commission's findings were primarily based, the system operations of the carrier were very prosperous. It was alleged too that in these petitions [fol. 197] there was an increased patronage of the Yonkers branch, but the plaintiffs did not set forth in this petition any specific figures to show what this increase was, although the Commission's rules of practice require that newly discovered evidence must in a petition for rehearing be briefly described.

In the absence of any showing that the increased business would tend to wipe out the large deficit, the evidence does not show a material change, for the Commission had recognized in its first report that the business had increased some 2.87 per cent in the past year, but went on to point out that the business of the carrier on its other commuter branches had increased to a much larger degree.

I have already discussed the question as to the statements that evidence would be introduced to show that the service on the connecting bus lines was deteriorating. I have considered that point.

As to the evidence on these questions for rehearing, we believe that the plaintiffs should not be allowed to put in any new evidence before this Court. The question before the Court is whether the Commission abused its discretion

and since plaintiffs in their petitions before the Commission set forth the nature of the evidence to be introduced, the [fol. 198] Court's decision, we believe, must be made upon the type of evidence proffered before the Commission and not upon any independent evidence which is offered now.

We submit, therefore, that the complaint should be dismissed.

ARGUMENT FOR INTERSTATE COMMERCE COMMISSION

Mr. Payne: Counsel for the plaintiffs have put before you as parts of the complaint most of the record before the Commission and we have admitted most of that in our answer, but there are just one or two little matters that I would like to offer in evidence, that is, certified copies from the Commission record which will show the attitude of the City of New York.

Judge Clark: Couldn't you wait until they have offered their evidence?

I suppose you want to introduce some evidence, Mr. Ryan?

Mr. Ryan: Yes, we have some evidence to introduce.

Judge Clark: Why don't you wait until they introduce theirs?

Mr. Payne: Anytime. It doesn't make any difference. I have copies of a memorandum brief which I prepared. I want to supplement just a little the argument on the jurisdictional question. First, I would call the Court's attention to the language of the statute, paragraph 18 of Section 1 [fol. 199] of part 1 of the Interstate Commerce Act, which is quoted in full at the bottom of page 2 of the mimeographed brief. It prohibits carriers by railroad subject to this part, that is, part 1 of the Interstate Commerce Act, from undertaking any new construction of lines, extension of lines or abandonment of lines without the Commission's certificate, and the latter part relates particularly to abandonment, reading: "And no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad or the operation thereof unless or until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Therefore, primarily, without anything to the contrary, the Commission has jurisdiction over an abandonment if it is one of all or a portion of a carrier by railroad subject

to part 1 of the Interstate Commerce Act, that is, to a railroad engaged in the transportation of passengers or property in interstate commerce or foreign commerce.

Another relevant provision is that in Section 22, in paragraph 1, which withholds jurisdiction from the Commission not only over spur, industrial switching, team tracks or to [fol. 200] be located wholly within one State, but also street, suburban or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

In that connection, the purpose of the Interstate Commerce Act primarily was to regulate the steam railway system of transportation of the United States. Congress did not wish to undertake the regulation of street railways or of railroads like the street railroads, and therefore it did not give the Commission jurisdiction over street, suburban or interurban electric railways which are independently operated. But where they are operated as part of a general steam railroad system of transportation, as in this case, they are subject to the jurisdiction of the Commission.

I think the facts, as have already been conceded, show that this Yonkers branch is a part of the New York Central system, which is a general steam railroad system of transportation. If there is any remaining doubt on that subject, I think it is resolved by decisions of the Supreme Court construing the general provisions of the Transportation Act of 1920. These abandonment provisions were added to the Interstate Commerce Act by the Transportation Act of 1920, and the purpose was to permit the railroads to rid [fol. 201] themselves of unprofitable branch lines along with a great many other similar provisions looking to the development and maintenance of adequate national transportation service. The act recognized the right of a railroad to a fair return.

Now all that was fully set out in the Colorado case, which is in reality the bible on abandonment; that is to say, the abandonment provisions are to be interpreted and applied in the light of the general purpose of the Transportation Act to develop and maintain adequate national transportation system and to strengthen that system by enabling railroads, whether they are prosperous or not, to rid themselves of unprofitable branch lines.

I want to call the Court's attention to the last annual report of the Interstate Commerce Commission, of which

the Court will take judicial notice, which points out that during the last year, that is, the Commission's fiscal year ending October 31, 1942, 227 applications were filed for permission to abandon 3534 miles of railroad lines or the operations thereof. Of these the Commission granted 184. That is at page 21. At page 22 it points out the present national demand for metals and rails which can be salvaged from abandoned railroads, and says that the carriers have [fol. 202] been making surveys of their branch line operations for the purpose of determining whether they are warranted in requesting permission to abandon any of them.

Under our cooperative plan with the War Department and the War Production Board, we notify them of applications for permission to abandon as these are filed and advise them of the status thereof. The War Department in each case notifies us whether it considers the line involved of military value. The War Production Board forwards to us as information notices of the requisition of lines of railroads and materials which it considers suitable for salvage purposes. In other words, lately and during the war there has been quite a spurt in abandonment cases owing to the desperate need of the War Department not only for scrap metal but also for relaying rails.

Two decisions of the Supreme Court have held or indicate clearly that the prosperity of the carrier has nothing to do with it—that is, the general prosperity. However, in the Colorado case, the railroad there involved was a prosperous and successful enterprise, but the operation of the particular branch was unprofitable and therefore the authority [fol. 203] of the Commission to authorize the abandonment of a branch line wholly within a State was fully sustained. It was sustained similarly in the Transit Commission case involving the abandonment of a branch of the Whitestone branch of the Long Island. It was contended there that the system as a whole was prosperous and in that case the Court said, "The Commission prefers to follow the decision in the Colorado case. The Court there held that in the issuance of a certificate of public convenience and necessity, the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line; that such burden might involve various elements, and that if upon the whole proof the conclusion was warranted that continued operation, in fact, unreasonably burdened the interstate

commerce of the carrier, the Commission was justified in authorizing abandonment."

There as here the system lay wholly within the State—no, not here. The system did not lie wholly in the State. But there the system lay wholly within the State and was prosperous and no claim was made that immediate abandonment of the local branch was necessary to enable the carrier to earn a reasonable return on its investment. Here as in the Colorado case the Commission had regard to the needs [fol. 204] of interstate commerce as well as intrastate commerce.

It was contended by Mr. Ryan that the Commission failed to find the fact showing its jurisdiction. I believe Mr. Pierce pointed out that there was no claim of lack of jurisdiction at the time of the hearing, no evidence was put in when the protestant had full opportunity to do so indicating that there was any lack of jurisdiction, and obviously there wasn't, since all that is necessary is that the unprofitable branch line be that of an interstate carrier. The question of whether the findings are supported by the evidence will be taken up by Mr. McLean, counsel for the New York Central, who handled this case before the Commission and who is thoroughly conversant with all the details.

I believe also that Mr. Pierce has sufficiently covered the question of the denial of the petition for rehearing. There is no claim here that the protestants were not present at the hearing that was held and were given full opportunity to present any evidence which they desired to proffer.

Judge Clark: I see in your memorandum here that you have a communication from Mr. Moses on behalf of the Mayor and the City to the effect that the building of this [fol. 205] additional subway is most indefinite and asking for denial of the rehearing.

Mr. Payne: Yes, your Honor.

Judge Clark: That, I suppose, is a part of the record?

Mr. Payne: The letter itself was the evidence which I offered earlier and which I will reoffer later on.

Judge Clark: Oh, I see. Very well.

Mr. Payne: As was pointed out, the hearing took place in November, 1942. The decision was handed down very promptly, and immediately thereafter the petition for rehearing was filed, and as a matter of fact, it didn't present anything of merit or anything to indicate that in the few intervening months conditions had changed other than those

shown in the record. It is a matter of common knowledge that there has been a curtailment of gasoline and rubber, but the commuters in Yonkers are not wholly dependent upon the buses nor is there anything to show that even with the gasoline and rubber curtailment there will not be adequate service. As a matter of fact, the president of the bus company was a witness before the Commission. He testified as to its service, that is to say, the buses run from the two principal stations in Yonkers where most of the commuters get on, from those stations over to the Ludlow Station of [fol. 206] the Hudson Division.

Judge Clark: That I take it is just a little more expensive, isn't it?

Mr. Payne: Yes.

As a matter of fact, the Commission's report frankly concedes that the alternative routes are not quite as convenient as this one. The Commission weighed those inconveniences as against the losses of the carrier and reached its conclusion. But, as a matter of fact, if further appears that with the advent of this bus line running over to the Hudson Division, the traffic on the Yonkers Division began rapidly going down and the report now finds that the traffic on the Yonkers branch is only 25 per cent of what it was 12 years ago.

We submit that the Commission's denial of the petition for rehearing was not an abuse of discretion, that under the Interstate Commerce Act it is provided that the Commission may grant rehearing if sufficient reason therefor be made to appear, and in the judgment of the Commission there was not sufficient reason here. And we submit that that was not an abuse of discretion, I believe that is all. Thank you.

ARGUMENT FOR NEW YORK CENTRAL RAILROAD CO.

Mr. McLean: It might be useful to the members of the Court to have copies of the map that was introduced as Exhibit 1, showing the location of the line in relation to [fol. 207] other transportation facilities in the City of Yonkers and also the other lines of the New York Central in the vicinity.

I desire to call attention particularly to the state of the record in regard to the suburban or interurban electric railway issue that has been brought up here, principally

whether the line is a part of a general steam railway system of transportation.

As stated, this question was not brought up at the hearing. No one raised it, but there is sufficient evidence to point to the character of the line. The application and return to questionnaire, which are sworn to, were introduced as a part of the record, and they contain in themselves all the proof that is really necessary to show the jurisdiction of the Commission. And under the Commission's rules of practice—I refer to rule 9 of the Commission's rules—"recitals of material and relevant facts in a pleading"—and this is a pleading—"filed prior to oral hearing at any proceeding unless specifically denied in a counter pleading filed under these rules shall constitute evidence and be a part of the record."

The application, which is Exhibit 1 to the plaintiffs' bill of complaint, contains on page 5 a resolution of the board of directors of the New York Central Railroad where it is [fol. 208] stated in part that the line to be abandoned is that portion of the Putnam Division of the New York Central Railroad known as the Yonkers branch extending from the main line of the Putnam Division at Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, a distance of 3.1 miles. It is therefore apparent that it is the judgment of the board of directors of the New York Central Railroad that this line is a part of the New York Central Railroad.

It also appears in the return to questionnaire, which is also a part of Exhibit 1, that from January 1, 1894, to March 7, 1913, the line was operated by the New York Central and Hudson River Company; and that on that latter date, the New York Central Hudson River Company absorbed the lesser line, which was the New York and Putnam Railway, and that a year later the New York Central and Hudson River Company became merged with the New York Central Railroad Company. So that this line has been operated as a part of the New York Central system since 1914. It is stated in the return to questionnaire, "The line proposed to be abandoned has been operated as a part of the Putnam Division of the applicant since applicant's formation in 1914."

[fol. 209]. The line was electrified in 1926 or in the period preceding 1926. I think the electric service was inaugurated February 1st of that year. That was done under a section

of the Public Service Law of this State, Section 53(a), which was later declared unconstitutional and in violation of the Federal Law by a three-judge court sitting in this district. So we have the situation where the electrification was undertaken by a statute held to be void because it conflicted with the Interstate Commerce Law, generally speaking. The particular feature was the Safety Appliance Act. The State statute attempted to apply the safety appliances that were to be put on this electric line and that was already covered by Federal statute. That case is reported in Volume 16 of the Federal Reporter, Second Series. The title, I believe, is *The Staten Island Rapid Transit v. The Public Service Commission*.

The return to questionnaire further shows in its answer to question 10 on page 5 that the Yonkers branch trains operate over the rails of the Putnam to Sedgwick Avenue and there are transfer arrangements from the Putnam trains to and from Grand Central. This makes the branch in its operational aspect certainly a part of the general steam railway system of transportation.

[fol. 210] The return to questionnaire also shows on page 8, answer to question 14, that the receipts for transportation beyond the branch, for transportation of these Yonkers branch passengers on the Hudson Division have been allocated entirely to the Yonkers branch indicating clearly that it is a part of the general system.

The return to questionnaire also sets forth that there is a system loss, a loss to the New York Central system, of approximately \$71,000.

The hearing, as I say, was not devoted particularly to this precise issue because it was never raised until after the report was filed and shows a number of things connecting this line with the New York Central system. The very map that you have before you was prepared by the engineering department of the New York Central. It is captioned "New York Central Railroad Company, Buffalo and East, Map of the Yonkers Branch Proposed Abandonment," and so forth.

Tariffs naming fares from this interstate branch are shown to be in existence as in Exhibit 6 that was introduced in evidence, tariffs that were filed with the Interstate Commerce Commission.

The multiple unit cars which are used on the system are interchangeable with other cars on the system.

[fol. 211] It was also shown that the tickets sold on this branch have divisional privileges, that is to say, a passenger buying a ticket to one of the stations on the Yonkers branch may use it interchangeably to and from an adjoining station on either the Hudson or the Harlem Divisions. That is done as a matter of convenience. Sometimes a passenger might live halfway between and a train on one line might be more convenient to him at a certain time than one on another. So the tickets show that this line is operated as a part of the general steam railroad system of transportation. The tickets are interchangeable on the Hudson Division, which is admittedly a steam railroad system.

There is another aspect of this case which has not been gone into by any of the parties who have preceded me, and that pertains directly to whether the interlocutory injunction should be issued by this Court pending final decision of the Court. Of course, if the Court does decide the case by the 12th of June, which is the day that the interstate commerce certificate becomes operative, under the recent extension it is unnecessary to decide whether an interlocutory injunction should be issued. But in case the Court cannot decide the case by that time, and also because that same problem is likely to arise should a stay be asked for [fol. 212] pending a possible appeal to the Supreme Court of the United States, I think it is well to go into that point here.

Of course, an interlocutory injunction does not issue as a matter of right nor as a matter of course in a case of this kind. It has to be granted or withheld within the discretion of the Court after a consideration of all the relevant facts and consideration of the injury to be done by the granting or by the refusing of the injunction. The leading case on the subject is *Virginian Railway Company v. United States*, 272 United States 858. That is a case involving principally the issuance of a stay pending an appeal to the Supreme Court of the United States, but the Court also discusses the issuance of an interlocutory injunction pending decision of the court below. It is admittedly more difficult to obtain an interlocutory injunction for a stay to the Supreme Court of the United States because by that time the Court has passed upon the merits of the case. But I think by the time necessary to issue an interlocutory injunction, here this Court will be convinced that this case has no merit.

The New York Central while opposing the issuance of any injunction suggests that if an injunction is issued by this Court, that it be limited to preserving the rails and [fol. 213] other facilities in place and that the railroad be permitted to cease operation over the track. The reason for that suggestion is that the equipment and manpower devoted to this service can in the public interest be more advantageously used elsewhere in the present emergency. The record shows that there are about 20 standard day coaches which can be used anywhere on the New York Central system now in service on the Harlem branch on trains 450 to train 474. Now those trains operate to and from North White Plains, a distance of about 24 miles. There are not sufficient electrical units available to provide for that service. So that these 20 standard coaches are being used every day in that service. Now if we can cease performing service on the Yonkers branch, we can take the 11 cars and substitute them for that number of cars on the Harlem Division and can have 11 additional standard coaches to be used anywhere in the United States. The Interstate Commerce Commission found that fact and it said in this language: "The abandonment would also release for use on other lines 11 units of the electrical equipment valued at \$235,000. It is proposed to transfer this equipment to the Harlem Division, which is powered by electricity. In turn, certain coaches used on the latter line which are suit- [fol. 214] able for use on trains operated by steam will be released for service on other parts of the system. These cars would make practically a full train, and taken with the baggage car and a diner, could go anywhere."

I think the Court can take judicial notice of the present situation with respect to cars and the difficulty, if not the impossibility, of procuring new cars, the greatly increased use of the railroads for civil and military traffic. In order to show the precise situation on the New York Central in relation to its passenger equipment and coach patronage, there has been annexed to the memorandum in reply to the order to show cause which we have filed with the Court an affidavit of Raymond D. Starbuck, who is the executive vice-president of the New York Central. The affidavit shows what the Court could presume, but it is here in detail. It shows that there is a great and growing demand on the New York Central for passenger coaches in order to handle the rising tide of civilian and military traffic. He shows, for

instance, that coach passenger miles, in railroad language, is the very best indication of the amount of patronage on the railroad—he shows that the coach passenger miles for the month of March, 1943, were 379,000,000 as opposed to 167,000,000 in March of 1942. In other words, there has [fol. 215] been a 100 per cent increase in the utilization of coaches.

Another thing that is pointed out in the affidavit is that furlough passengers, that is, men in the armed services who are released temporarily to go to their homes, that that traffic has increased about ten times. For instance, in March, 1942, there were 14,000,000 odd passenger miles by men on furlough and in March, 1943, there are 106,000,000 miles on the New York Central system.

Another significant figure shown in the affidavit is that the miles per coach passenger, that is, the number of miles that the average coach passenger on the New York Central rides has increased within one year taking March, 1942, when the mileage was 98.18, to 131.62 in March, 1943. So that our coaches are being used not only by more people but the people are traveling further.

The affidavit also points out that there is a great demand for Pullman accommodations and that there are not as many Pullman cars as there used to be because the Army has taken a great part of them. Consequently, those people who can't ride in the Pullman cars are having to ride in the day coaches, and that is increasing the demand for day coaches.

[fol. 216] There is also in the affidavit some indication of the military demand for coaches. It points out that the New York Central system over a period of six months has had from 80 to 454 of its coaches off its line in military traffic. One reason for that is that many of the camps to which the soldiers have to be transported are located in southern territory and the southern railroads, before the war did not have the coaches. The New York Central, for instance, has more coaches because of its greater patronage, has more coaches than all the southern railroads put together. So that when they move the men they have to take New York Central coaches not only for moving them within our territory but for moving them to southern territory and often within southern territory.

The New York Central has made every effort to procure additional coaches. You may know, if you travel on the

trains, that chair cars have practically disappeared. The Central purchased from the Pullman Company several chair cars and converted those chair cars into coaches because more people can be accommodated in coaches than can be accommodated in chair cars. In addition, it has restricted the use of lounge and parlor observation cars have been cut off. And even in some cases on the Central at the [fol. 217] present time we are using Pullman trains as day coaches. They operate night runs between cities, say, between Detroit and Chicago, the train known as "The Motor City" that goes from Chicago to Detroit each night. Those trains have been turned around and operated as day coaches between Chicago and Detroit during the time of that run. People use them who just pay coach accommodations.

That has been brought about because Fort Custer is located on the Michigan Central and when these soldiers get furloughs we rent Pullmans from the Pullman Company and operate them as coaches.

Now that situation, generally speaking, is common to other railroads in this area, so that we say in this case where there are ten coaches being used on this Yonkers branch, they could release coaches, standard coaches, on the Harlem Division that we should be permitted to use during the pendency of this litigation. It is especially true because these people on the Yonkers branch have to have two sets of equipment provided for them. Suppose a Yonkers branch passenger starts out from Grand Central. He occupies a seat in the Hudson Division train and gets out of that seat at High Bridge, the transfer point, and he has another seat provided for him on the Yonkers branch, and the seat he has taken remains vacant up to the end of [fol. 218] that run. Consequently, he occupies a seat on the Hudson Division and the railroad must provide one in addition on the Yonkers branch. A good many of these patrons can come over to the Hudson Division. Some people live very close to the Yonkers branch and prefer to go to the Hudson Division and take the same train there that they would otherwise get by transferring down the line. So it is our urgent plea that if the Court sees fit to enter any interlocutory injunction or any stay of the proceedings, that it be limited to keeping the facilities in place. The Interstate Commerce Commission has exercised its judgment that public convenience and necessity permit the abandon-

ment, and we think that the Court should give the Commission's judgment in that respect full weight and permit us to take these cars off pending this litigation.

Judge Clark: I take it that completes the representations of the defendants' side.

ARGUMENT FOR CITY OF NEW YORK

Mr. Horowitz: I would like to have one minute.

Judge Clark: I have forgotten you. You represent the City, do you?

Mr. Horowitz: That is right.

Mr. Ryan: If your Honor please, the City of New York is not a party and so far as I know it hasn't any interest in supporting the Interstate Commerce Commission and [fol. 218a] the Railroad in this case. If they want to argue the case, it seems to me they should get in in the usual way that anyone else has to get in.

Judge Clark: I think we will hear you for a minute.

Mr. Horowitz: Thank you, sir. The State has always welcomed the City in matters affecting railroads until now, and I think that in good grace it ought to welcome its opinion even though it doesn't happen to agree in a particular matter with the Public Service Commission.

I think that the defendants' interest in the case has been more than adequately presented. I wanted to say but a word with respect to the matters peculiarly affecting the City of New York. I think the petition for a rehearing, which the plaintiffs now claim the Interstate Commerce Commission improperly denied, was based in the main on two items in which the City is interested. One is the alleged newly discovered evidence proffered to the Commission at the time of the hearing. This claimed newly discovered evidence was a letter written back in 1939 by the Comptroller stating that the City intended to build a short shuttle branch. We think the plaintiffs have urged upon this Court that changed conditions should be considered, [fol. 219] and we think that that same precept applies here, and that certainly since 1939 conditions have changed so tremendously that it is now understandable why the City says that there can be no assurance whatsoever that this line will be built, and certainly as to when it will be done.

Judge Rifkind: Certainly the City has no interest in the abandonment or continuance of this line?

Mr. Horowitz: I think the City has an interest. This line runs through Van Cortlandt Park, one of the great parks of the City. I think it hardly needs to be urged that the existence of railroad track in a great park is of tremendous interest to a city. And of course if the railroad line is absolutely essential, the City might entertain a request to permit tracks to go through its great parks. It feels in this case that the need is almost non-existent, that there are these other facilities. So that we do have, I think, a somewhat direct interest on behalf of the people.

The other point urged upon the Commission in connection with the application for rehearing was the possibility of tax reductions. Now, of course, the petition itself admitted that no municipality may legally agree in advance to make any tax reductions, and because of that fact Yonkers admitted that it could not agree in advance to make [fol. 220] any reductions. I am not familiar with what the tax situation is there, but if the facts offered with respect to New York City are any indication, I think the claim made is absolutely untenable.

The suggestion has been made with regard to the City of New York that taxes now in the amount of \$10,500 would be reduced by \$10,000. Obviously, that is a very absurd claim. And if this is the factual background in Yonkers, then we are very much afraid that the claim being tendered to the Commission and this Court is rather a loose one.

Judge Clark: Well, gentlemen, for my part I thought them very enlightening.

OFFERS IN EVIDENCE

I take it the only thing left is the matter of introducing this evidence. Can't we do that now instead of adjourning and coming back?

Mr. Ryan: I think perhaps we might.

Judge Clark: Very well; suppose you proceed.

Mr. McLean: It might be helpful if we could confer with

Mr. Ryan. I don't know but what we might save some time.

Mr. Ryan: The first thing I want to offer is the complete record before the Interstate Commerce Commission.

[fol. 221] Judge Clark: That certainly we need.

Mr. Ryan: It consists of the transcript of the hearing and the exhibits which were received at the hearing before the

Interstate Commerce Commission. Shall I proceed with the offer?

Judge Clark: I think perhaps that might be shorter. After all, I think I have in mind in general what you are going to offer.

Mr. Ryan: I offer in evidence the transcript of the hearing held on November 12, 1942, before the Interstate Commerce Commission in Docket No. FD13914.

(Marked Exhibit 1.)

Mr. McLean: Is that referred to as Exhibit B in your complaint?

Mr. Ryan: That is referred to in the complaint as Exhibit B, and it is stated in the complaint that it will be filed with the Court.

I would like to offer in evidence as Exhibit 2 the minutes of the oral argument before the Interstate Commerce Commission held on March 3, 1943, in the same proceeding.

Judge Clark: Very well.

(Marked Exhibit 2.)

Mr. Ryan: I have here seven exhibits which were received at the hearing before the Interstate Commerce Commission in November, 1942, in this same proceeding. I wonder if they may be offered as one exhibit.

Judge Clark: I should think so.

Mr. Ryan: Those were all the exhibits received in the hearing before the Interstate Commerce Commission on November 12, 1942.

Mr. McLean: There was one exhibit, Exhibit 8. That is an exhibit from the City of Yonkers and is a map showing some tax assessment districts. It is not important and I would waive its introduction.

Mr. Ryan: The minutes do not show it was received.

Mr. Broderick: Yes, it was received; it was Exhibit 8 for us.

Mr. Ryan: I do not have a copy of it and I didn't believe it had been received by the Interstate Commerce Commission.

Is everyone agreeable to waiving that exhibit or just having it filed later with the Court?

Mr. Payne: If the Court please, Mr. Ryan and I had an understanding that this uncertified copy may be received at this time with the understanding that he will withdraw

it and send it down to the Commission for certification, and perhaps at that time Exhibit 8 may be included.

[fol. 223] Judge Clark: Very well.

Why isn't this all offered as a part of Exhibit 1? The record and all the exhibits can be marked Exhibit 1. If you want to use letters to distinguish the exhibits, I should think you could do that, but this is all part of the record.

Mr. Ryan: All right.

Judge Clark: If you want to distinguish them, you can say 1-A, 1-B, and so on, but I think this is all part of the record and we better get it so designated.

(Maps marked Exhibit 1-A.)

Mr. Ryan: I would like to offer in evidence a certified copy of an order made by the Public Service Commission of the State of New York on May 28, 1943, instituting an investigation on that Commission's own motion with reference and your argument.

York Central Yonkers branch and suspending tariffs filed by the New York Central Railroad Company proposing to cancel the fares and privileges on that branch, and setting a hearing in that proceeding to be held before the Public Service Commission of the State of New York at the State Office Building, 80 Center Street, New York City, on Friday, June 25, 1943.

Mr. McLean: I desire to object to the introduction of [fol. 224] this because it has no pertinency to this case and it is nothing but a belated attempt on the part of the Public Service Commission to exercise jurisdiction. In fact, it was entered since this case was started.

Judge Clark: As I understand it, this is just an order which sets a preliminary hearing and so on.

Mr. Ryan: It is an assertion of jurisdiction over the abandonment of this line by the Public Service Commission of the State of New York, which we claim has exclusive jurisdiction over its abandonment.

Judge Clark: I suppose your presence here representing the Commission is emphatically that anyway.

Mr. Ryan: Yes.

Judge Clark: This isn't anything more than your presence and your argument.

Mr. Ryan: It is an official act by the Commission and by the Commission's order they suspend the proposed cancellation of service on this line and set a hearing.

Judge Rifkind: I just want to know if you concede that if the Interstate Commerce Commission has jurisdiction, then its jurisdiction is exclusive. And if it is, then I don't see why you need this exhibit.

Judge Clark: I was going to say substantially the same thing. You have in your statement a fact which we assume anyway, that the Commission has taken steps to [fol. 225] assume jurisdiction, and you representing them, claim jurisdiction, and I should think we know that fact, and I don't think there is any more that can be shown by that order. We have the fact and we don't need any more.

Mr. Payne: Your Honor, I would object to it on the ground it is irrelevant. The New York Public Service Commission of course has jurisdiction over intrastate fares in New York. We would not claim jurisdiction over that unless it was found to be discriminatory against interstate commerce. Whereas, under the abandonment—

Judge Clark: I think it is—

Mr. Ryan: May I just say this before you finally rule? The New York Central referred in its argument to the fact that the fares on this line were filed with the Interstate Commerce Commission. The fact of the matter is that the fares on this line are filed with the Public Service Commission where they should be filed. It is an intrastate operation, and I would like to amend that offer of the order with certified copies of the tariffs which are described in the order proposing to cancel—which were filed by the New York Central with the Public Service Commission proposing to cancel operation over this line, if I might. [fol. 226] Judge Clark: Well, I can't see that that is going to add anything to your statement. I think we will exclude it.

Mr. Ryan: May we have an exception to the ruling?

Judge Clark: Very well.

Mr. Ryan: Should these be marked for identification, your Honors?

Judge Clark: Very well.

(Marked Exhibits 3 and 3-A for identification.)

Mr. Ryan: I have here a printed copy of general order 39 of the Office of Defense Transportation, dated May 27, 1943. When I heard that this Court might pass on the merits of this case today, I wired the Office of Defense Transportation to send me certified copies of this order

They complied with the request by just sending me a printed copy which is not certified. I assume, though, that no question will be raised as to its admissibility on the ground that it is not certified.

Mr. McLean: None at all.

Mr. Ryan: This is the order of the O.D.T. wherein the O.D.T. directs bus operators to reduce their present mileage by 40 per cent or 20 percent. Of course, it speaks for itself.

Mr. Payne: No objection on the part of the Commission. I thought you might take judicial notice perhaps [fol. 227] of the order of the O.D.T.

Judge Clark: You are not objecting to it as such. I think we might as well take it then and have our judicial notice exact if we can.

(Marked Exhibit 4.)

Mr. Ryan: Will your Honors also take judicial notice of the official regulations issued by the Office of Price Administration covering the restrictions imposed by the O.D.T. curtailing the use of gasoline and rubber for transportation purposes subsequent to the date of the hearing before the Interstate Commerce Commission in November, 1942. It would be helpful from my standpoint if you would because the fact is that I requested certified copies of those regulations from the O.P.A. and I received a telephone call this morning stating that they had been sent out air mail express today and might be here this afternoon, but they are not here now.

Judge Clark: Were you going to say something?

Mr. McLean: No objection to the form of the offer, but as to the relevancy to this proceeding we do object because it carries with it the presumption that this is going to have some specific effect upon the bus operations that will serve these communities. That doesn't necessarily follow.

Judge Clark: I should think on this I am not sure just [fol. 228] what effect this will have and I think it would be better if we take this subject to further consideration as to its materiality later. There is no jury here, of course, and I don't believe we should settle that now. We can take it and then decide later.

Mr. Pierce: That is perfectly agreeable to us. We can make the general objection to its materiality.

Judge Clark: Very well. Suppose we take it subject to the general objection of materiality.

Mr. McLean: It cannot be presumed that if these additional passengers come to this bus, that they cannot get some relief on account of the disturbance in the transportation setup.

Judge Clark: Now if you want to put the regulations in later, you may if you wish, but it is a notorious fact, I think.

Judge Rifkind: I think it would be well to have him identify it.

Judge Clark: That might be well.

Mr. Ryan: Suppose I file it with the clerk. They may come with it perhaps before we finish here today.

Mr. Gray: I suggest that they be assigned an exhibit number, and when they come into the hands of the clerk that they be so marked.

Judge Clark: Very well; mark them the next number [fol. 229] ber.

(Papers referred to to be marked Exhibit 5.)

Mr. Ryan: There are two other matters that I wanted to have in the record. One of them is the order of the Interstate Commerce Commission extending the effective date of this abandonment order to June 12th that was passed by the Commission from the 29th day of May, and perhaps that should go in under our general offer of the record.

Judge Clark: I should think that would be a part of the record.

Mr. Ryan: And may the same understanding be applied to another paper which went into the Interstate Commerce Commission in this case from the Brotherhood of Locomotive Firemen and Engine Room Men and so on, asking the Commission to reserve jurisdiction over the question of employees, which was in fact reserved by the I. C. C. in its order authorizing the abandonment.

Mr. McLean: I think that is entirely irrelevant. There is no dispute as to it. It is recited in the Commission's order.

Mr. Ryan: I don't want it in except that I want to be sure that this Court has all the records before the Interstate Commerce Commission.

Judge Clark: That is referred to in the Commission's [fol. 230] order, is it?

Mr. Ryan: Yes.

Judge Clark: Then I suppose you need not put it in. I understand there isn't any question about it.

Mr. Ryan: All right.

Now I have a witness here and I don't know whether the Court would take his testimony, and I think perhaps in view of the lateness of the hour if I could get a ruling on it, it might save us some time. I propose to present through this witness, who is a competent witness, an exhibit showing a change in the financial condition of the New York Central Railroad between 1942 and April, 1943, when the application for a further hearing was filed with the Interstate Commerce Commission by the plaintiffs. There are seven separate schedules which I propose to offer through this witness.

Judge Rifkind: They show an improvement in their condition?

Mr. Ryan: Oh, yes, definitely.

Judge Rifkind: Maybe your adversary will concede that.

Judge Clark: There is no question but that the railroads are doing much better.

Mr. McLean: I don't think so. The increase of taxes in certain classes of employees, that is, income tax due to [fol. 231] certain adjustments which were made, reduction of freight rates recently made by the Interstate Commerce Commission in a decision that everyone refers to as *ex parte* 141, which Mr. Ryan is quite familiar with, indicate differently. I think if we started to go into that we may have more than we ask for.

Judge Clark: I want to find out a little more about this. Was this a part of your application for rehearing before the Commission? How did it come in?

Mr. Ryan: The application for rehearing requested an opportunity to submit evidence showing the improved financial condition of the New York Central Railroad as a whole. That request, of course, was denied by the Interstate Commerce Commission.

Judge Clark: Of course, we are not going over the facts in detail. We take the record from the Interstate Commerce Commission, but I don't think we want the evidence as such. We ought to have it clear just what you requested

when you made your application for rehearing. I think that is in the papers, isn't it?

Mr. Ryan: Perhaps that is so, your Honor. We want to do everything here that we should do in order to raise the question of whether or not the Interstate Commerce Commission afforded these plaintiffs a fair and adequate hearing. Now in the petition for a rehearing I think the [fol. 232] evidence is described generally and it does allege an improvement in the financial condition of the New York Central Railroad, and perhaps that is sufficient for the purpose of this case.

Judge Clark: I should think we ought to take the situation as it was presented in the petition for rehearing.

Mr. Ryan: All right.

I have two further things, and they are maps, one of which I furnished to the Court at the outset of my argument, that is, a map taken from the official time table issued to employees by the New York Central Railroad Company which purports to show the electric division in the New York terminal district of that company, and I offer that in evidence.

(Marked Exhibit 6.)

Mr. McLean: I object to it on the ground that it is cumulative. It covers the same ground as the other exhibits that were introduced before the Commission. It can serve no useful purpose here. I have no objection to the Court looking at the copy you have in your hands, but making it a part of this record seems to be cluttering it up too much.

Judge Clark: Was this before the Commission?

Mr. McLean: No, it was not.

[fol. 233] Judge Clark: Well, I shouldn't think we ought to take it then.

Mr. McLean: If Mr. Ryan wants to introduce it to show that this is not a part of the record on the jurisdictional question, perhaps he has the right to have it introduced there, but he certainly should supply a witness to describe what is shown on the map.

Judge Clark: I don't think it is important enough to stop for. We have looked at it. Perhaps we ought to have it marked. You can mark it.

Mr. Ryan: That completes the evidence which I intend to offer on behalf of the New York State Public Service Commission.

Judge Clark: Has the Interstate Commerce Commission something to offer?

Mr. Ryan: I think perhaps some of the other plaintiffs may wish to offer something.

Mr. Broderick: I would like to introduce an affidavit of Arthur J. McGregor, Tax Commissioner of the City of Yonkers, in relation to reduction in assessed valuation.

Mr. McLean: What is the date of that?

Mr. Broderick: That was in the petition.

Mr. McLean: I believe that is already a part of the plaintiffs' complaint which has been filed, if I am not mis-
[Vol. 234] taken.

Mr. Broderick: It is referred to in the complaint.

Mr. McLean: I think it is a part of Exhibit D, attached to the bill of complaint.

Mr. Broderick: That is right. Well, the only thing, I wanted to be sure that the Court will consider it.

Judge Clark: Is it a part of the complaint?

Mr. Broderick: Yes, sir, part of our petition.

Judge Conger: That is, your petition that we have there?

Mr. Broderick: Yes, sir.

Judge Conger: It is right in the petition.

Judge Clark: Well then, I don't think you need offer it.

Mr. McLean: It is Exhibit K.

Judge Clark: Exhibit K?

Mr. Broderick: Yes, sir.

Judge Conger: What about copies of the answers? I have a copy, but I don't think the other Judges have copies of the answers.

Mr. McLean: I have an extra copy of the New York Central's answer, sir, that I can supply.

Judge Conger: I have one copy.

Mr. Pierce: We sent up an original and three of the answer of the United States. I assume it has been served.

[Vol. 235] Mr. Payne: Your Honors, I sent you three copies.

Judge Conger: Here they are.

Mr. Broderick: If your Honor please, what is the ruling on that? Does that go in?

Judge Conger: You don't need it because it is in the petition.

Mr. Broderick: I would like to introduce in evidence the affidavit of Sheldon L. Pollock, War Transportation Administrator for the City of Yonkers, New York, verified—

Judge Clark: Yesterday, I think.

Mr. Broderick: —yesterday, the 1st day of June.

Judge Clark: I see we have copies here.

Mr. Broderick: Yes, sir.

Judge Clark: I should think that bore on the same point of the regulations of the O. P. A. and others. I should think we better take it and consider whether it has materiality later.

Mr. McLean: I don't understand quite what this is about.

Mr. Broderick: This is an affidavit from the War Transportation Administrator of the City of Yonkers.

Judge Clark: This is what I referred to earlier. I found it on the bench here.

[fol. 236] Mr. Broderick: In which he says on account of this order just issued bus curtailment in the City of Yonkers will be drastic.

Mr. McLean: We object very strenuously to that document going in. The person making that affidavit is presumed to talk generally of the situation in the City of Yonkers. It hasn't any bearing upon this particular bus company.

Judge Clark: He is an attorney at law. I suppose he must know about all these things.

Mr. Broderick: He is an official of the United States Government, the War Transportation Administrator, and the affidavit shows that he consulted with all the bus operators in the City of Yonkers, and he knows all about the situation.

Mr. Pierce: Can't that be taken subject to our general objection?

Judge Conger: Yes.

Judge Clark: We will take it subject to the same consideration as we did the other regulations of the O. P. A.

(Marked Exhibit 7 for identification.)

Mr. Gray: If the Court please, I offer in evidence a certified copy of the letter of November 8, 1939, addressed to the Transit Commission, from the Comptroller of the City of New York and Mr. Delaney, the chairman of the Board of Transportation, which is set out in Exhibit 14, which is attached to our complaint.

Judge Clark: Now then, I take it that you presented the substance of it on your application for rehearing, is that it?

Mr. Gray: Yes, on my application for rehearing, and I attached a photostatic copy of the original letter, and in order to make my chain of proof clear—

Judge Clark: I shouldn't think you needed to put in any more. The Commission I don't suppose questioned the letter itself—I mean questioned the fact of the letter.

Mr. Gray: As long as the record may show that the attachment to my petition for rehearing is a correct copy, it is sufficient for me.

Mr. McLean: It is a photostat.

Judge Rifkind: It has not been challenged.

Judge Clark: I don't think you need that.

Mr. Gray: I have also subpoenaed the Board of Transportation. Is Mr. Kohler here?

(A man stands up in back of courtroom.)

Judge Clark: What is this now?

Mr. Gray: This is a letter which is produced by the Board of Transportation of New York, dated June 17, 1941, and addressed to Honorable Rexford G. Tugwell, chairman of the City Planning Commission, in which this proposed [fol. 238] subway extension is described and its necessity stated. This was part of the evidence referred to in the application for rehearing.

Judge Clark: Well, I take it that you have stated the substance of this or whatever you ~~thought~~ was material in your petition for rehearing. I again would feel that we should take what the Commission had, but I should be doubtful if we should go into more detail than they did. I understand you referred to it in your petition for rehearing?

Mr. Gray: Yes, sir, but our position is that the action of the Commission was arbitrary and unreasonable and we wish to show what would have been advanced to the Commission as evidence if they had given us an opportunity to do so; and that it really has substance particularly in view of the position now taken by the gentlemen of the City of New York that it is all ephemeral.

Judge Conger: One can't always tell what the City of New York is going to do.

Mr. Horowitz: All I say is that there are about 400 types of plans of all various projects in the City. I don't know whether—

Judge Clark: I think perhaps we better take it temporarily. We will consider that this too is subject to your [fol. 239] objection.

Mr. McLean: We certainly do object.

Judge Clark: Yes, very well.

(Marked Exhibit 8.)

Mr. Gray: I would also like to have it appear of record that so far the City of New York has expended about \$150,000—

(Mr. Gray confers with Mr. Kohler.)

Mr. Gray: Then let it appear that the City of New York has appropriated \$150,000 for the purpose of preparing plans for this subway extension, and that so far the construction plans have been completed except for—

Judge Conger: Is that an appropriation in the budget for 1943? Is that passed yet?

Mr. Gray: Yes, sir.

Mr. Kohler: That is for studies and plans.

Mr. Gray: And that the plans for excavating a structure have been completed.

Judge Conger: For what?

Mr. Kohler: That is for an extension of the subway line from 145th Street and Lenox Avenue to connect with the elevated line at 155th Street and Eighth Avenue. The studies are not as yet complete although plans are drawn because the City doesn't own the drawbridge, which is an essential facility in extending this line.

[fol. 240] Judge Conger: Who owns the drawbridge? The New York Central?

Mr. Kohler: We have no rights other than—

Judge Conger: Who owns the drawbridge?

Mr. Kohler: The New York Central Railroad.

Mr. Gray: Which, of course, is subject to condemnation.

Judge Conger: I am afraid the City of New York wouldn't have enough money to pay for that drawbridge.

Mr. Gray: May I also have it appear of record that in a brochure issued by the City Planning Commission supplement of October, 1942, reference to this subway extension

is found at one of the pages, and may I read just what it says rather than offer this whole brochure in evidence?

Judge Clark: All right, if you make it short.

Mr. Gray: Yes, sir.

"Unification of the Rapid Transit Lines of the City has created many opportunities for integrating the services on the three main transit systems now under the control of the Board of Transportation. Most of the items included in the post war works program for rapid transit are to accelerate the physical integrating of these lines. The connection between the Culver Line and the Independent System in Brooklyn, the Broadway-Lenox Avenue extension in [fol. 241] Manhattan, the link between Queens Boulevard and 60th Street, the B. M. T. tunnel and the West End-Smith Brooklyn connections are all designed to improve service on the existing unified system."

Judge Clark: That is all you have, Mr. Gray?

Mr. Gray: Yes, sir.

Judge Clark: The Commission, I think, has something to offer.

Mr. Payne: I just have one letter. It is in the nature of a reply to the petition for rehearing. It is a certified copy of a letter from the record before the Commission, dated April 30, 1943, by Robert Moses, Park Commissioner, member of the City Planning Commission, addressed to W. P. Bartel, secretary of the Interstate Commerce Commission.

Judge Clark: Was that in the record before the Commission?

Mr. Payne: Yes, your Honor, it was in the record.

Mr. Ryan: This was not served on any of the parties who appeared before the Commission. The Commission may have had some ex parte evidence which it took in connection with this matter. For that reason we will object to its receipt before this Court.

Judge Clark: Very well.

[fol. 242] (Marked Exhibit A.)

Judge Clark: Is there anything more?

(No response.)

Judge Clark: I take it you gentlemen have put in all the memoranda that you wish to put in. I haven't kept track of it all. I think you all have briefs and memoranda.

Judge Conger: I didn't see any memorandum from the United States.

Mr. Pierce: We didn't have one, your Honor.

Mr. Payne: Your Honor, I have requested findings of fact and conclusions of law.

Judge Clark: You have filed them, have you?

Mr. Payne: Yes.

Mr. Ryan: Our memorandum, of course, is set up on the basis of an application for temporary injunction, but I think it will be applicable to the case.

Judge Clark: I should think it would cover everything.

Mr. Gray: I should like to answer Mr. Payne on one or two matters that he brought up in his argument.

Judge Clark: You don't mean orally?

Mr. Gray: I did.

Judge Clark: Why can't you do it very briefly in written form?

[fol. 243] Mr. Gray: Very well; I can do that.

Judge Clark: I should think that would be better. Submit it in a day or two.

Mr. Gray: On the question of an interlocutory injunction pendente lite, I want to express my dissatisfaction with the suggestion that we just keep the tracks and keep other equipment and allow the railroad to use these cars and put all these people to all kinds of inconvenience. These people are fighting this war just as much as the railroad company is. There is no reason why they should be put to additional expense while the railroad is working at such tremendous profit. These people will lose from 40 minutes to one and a half hours a day out of their time if they are compelled to use the alternative service. The alternative service which the railroad says we have is by no means an equivalent service. It is more expensive, it is more wearing. These people are going to be seriously affected by this abandonment. If they wanted to use other means they would have done it long ago. To make a person travel 14 miles on a surface line, get off and change to a subway, is wholly unreasonable.

Judge Clark: What time do they get up up there?

Mr. Gray: We always get up with the sun.

Judge Clark: That isn't any answer. What time does the [fol. 244] train leave?

Mr. Gray: The first train gets out at 7:45. That is the first heavy train.

Judge Clark: That is not too early.

Mr. Gray: Between 7:45 and 8:10 is when you find most of your traffic. The buses can't handle the extra traffic. They can't handle 600 passengers or even 350.

Judge Clark: I think we have that. If you want to add any more you put it in your statement.

Mr. Pierce: May I ask the privilege of submitting a brief memorandum in answer to some of these statements?

Judge Clark: Yes. You better do it quickly. If you want to add any more, any of you, do it in a couple of days.

Mr. McLean: I have had a chance to read this affidavit of Mr. Pollock. I think he takes advantage of his position as Transportation Administrator and then proceeds to state, "What I believe" and "What I feel in respect to this service." I think it is highly inadmissible and prejudicial.

Mr. Gray: In considering the interlocutory injunction may it also include time, if necessary, for us to go to the Supreme Court if we have to?

Judge Clark: I understand this is a hearing both on the [fol. 245-246] preliminary injunction and on the merits and when we decide we will attempt to cover all points involved and make it final as far as we are concerned.

Mr. Ryan: And it is so understood by the plaintiffs and the defendants.

[Fols. 247-249] EXHIBIT No. 1 BEFORE STATUTORY COURT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. FD-13914

In the matter of the application of the New York Central Railroad Company for a certificate of public convenience and necessity permitting abandonment of the line of railroad extending from Van Cortlandt Park Junction, New York City, to Getty Square, New York

City Hall, Yonkers, New York,

Thursday, November 12, 1942.

Met, pursuant to notice, at 9:30 o'clock a. m.

Before: A. H. Schuttrumpf, Examiner.

Appearances:

Harold H. McLean, 466 Lexington Avenue, New York, N. Y., appearing for New York Central Railroad, applicant.

Leonard G. McAneny, City Hall, Yonkers, New York, and Harold T. Garrity, City Hall, Yonkers, New York, representing City of Yonkers, Protestant.

Horace M. Gray, 42 Broadway, New York, N. Y., representing Committee of Yonkers Commuters, Protestant.

Harry Hertzoff, Municipal Building, New York, N. Y., representing William Q. Chanler, Corporation Counsel of New York City, in favor of the application.

George E. McVey, 80 Centre Street, New York, N. Y., representing the Public Service Commission, Protestant.

[fol. 250]

Proceedings

Exam. Schutrumpf: The Interstate Commerce Commission has assigned for hearing at this time and place the application of the New York Central Railroad for permission to abandon its line extending from Van Cortlandt Park Junction, in New York City, to Getty Square, Yonkers, approximately 3.1 miles, Finance Docket 13914.

Who appears for applicant?

Mr. McLean: Harold H. McLean, 466 Lexington Avenue, New York City.

I am admitted to practice before the Interstate Commerce Commission.

Exam. Schutrumpf: Who appears for protestants?

Mr. McAneny: Leonard G. McAneny, Corporation Counsel of the City of Yonkers, and Harold T. Garrity, Assistant Corporation Counsel of the City of Yonkers.

Mr. McVey: George E. McVey, Assistant Counsel for the Public Service Commission, State of New York.

Mr. Gray: Horace M. Gray, 42 Broadway, New York, appearing for a Committee of Yonkers Commuters. I am admitted to practice before the Interstate Commerce Commission.

Mr. Hertzoff: Harry Hertzoff, appearing for the Corporation Counsel of the City of New York.

Exam. Schutrumpf: Any further appearances?

(No response.)

[fol. 251] Exam. Schutrumpf: The application and return to the questionnaire are part of the record, subject to the right of cross-examination. The applicant may proceed.

Mr. McAneny: Mr. Examiner, before we proceed, may I state that on behalf of the City of Yonkers, in opposing this application, we ask that your Commission consider not only the cost statistics and the statistics as to the travel

ing public that may be presented, but also the effect that the abandonment of this line might have on the real property values of the city. The assessed valuations of the city may be affected to such an extent, possibly by reduction, so that the city might suffer a financial loss in tax valuation, which at this time would be a very unfortunate situation.

I don't think that any proceedings should be taken that might tend to cripple the income of cities at this time. A great deal is put upon cities in the way of defense, additional expense, and it should be a consideration that the income of cities should be carefully guarded; and also I wish to present in this hearing proof as to the vital necessity of this line as a means and an aid to civilian defense, to the transportation of people in case of emergency, also to the transportation of troops or guards from the city of Yonkers—rather, from the city of New York to the city of Yonkers, or vice versa, in case of attack upon public works in this city or in the city of New York.

[fol. 252] The City of New York has extensive water works in this city and this railroad is a most important avenue for the transportation of such defense troops or guards.

I might say that in this state it seems that the main argument of the railroad, in addition to those they have advanced in other years, is that this would furnish scrap metal. Now, I don't think it is any time to scrap essential means of transportation. We are not scrapping the Brooklyn Bridge; we are not scrapping other structures. I am just simply asking your Honor to consider such arguments as will be presented along those lines.

Exam. Schutrumpf: Perhaps I should say at the outset that the Examiner is sent out to merely get the facts and not to hear any argument any more than is possible.

Mr. McAneny: We expect to present facts of those points.

Mr. Gray: Pursuing the conversation informally that we have just had, I wish to make an application for the continuance of this hearing until this evening or, if possible, to an evening in some subsequent day in order to permit those who are engaged in war work to have a chance to be heard, particularly the commuters. I am doing this merely to have the application on the record so that it will form the basis for a further hearing, if necessary.

Exam. Schutrumpf: Suppose we let ride until later in [fol. 253] the day and see if we can pick out a specific hour in which to resume, maybe later this evening?

Mr. McLean: It would appear to me offhand that the effect of such testimony would only be cumulative.

Exam. Schutrumpf: That may be so, and I have told Mr. Gray informally that if he would get some representative witnesses, he could probably enter into a stipulation with you as to the number who would testify to the same general effect. We will let it ride that way until later on in the day.

Applicant may proceed.

Mr. McLean: I will call Mr. Voorhees.

BOYNTON S. VOORHEES WAS SWORN AND TESTIFIED AS FOLLOWS:

Direct examination.

By Mr. McLean:

Q. Your full name, please.

A. Boynton S. Voorhees.

Q. And where do you live?

A. At 116 Franklin Avenue, Yonkers.

Q. And how long have you lived in Yonkers?

A. About 30 years.

Q. Are you familiar with local transportation conditions in the city of Yonkers, Mr. Voorhees?

A. I am.

Q. What is your position with the New York Central Railroad?

[fol. 254] A. Assistant Vice President.

Q. How long have you worked for the railroad?

A. I worked for the railroad for 34 years.

Q. That's about the length of time you have lived in the city of Yonkers; is that right?

A. Yes, almost.

Q. What are your duties as assistant vice president?

A. We make special studies, such as extensions, consolidations, coordination, joint facility arrangements, abandonments. We analyze the larger construction or engineering projects and generally prepare these projects for executive submission.

Mr. McVay: The witness started that sentence off with we. Did you mean the company or just yourself personally?

By Mr. McLean:

Q. Explain what you mean by "we."

A. I was referring to my office, of which I am in charge.

Mr. McVay: I don't know that we are concerned with his office.

Mr. McLean: Right at the beginning, Mr. Examiner, can we get an understanding with counsel that useless interruptions of this kind aren't going to serve any purpose whatsoever?

Mr. McVay: What brings on this—that it is useless? This man can testify for himself, as I understand it.

Exam. Schutrumpf: This man is in charge of the department. The objection is overruled. Will you proceed?

[fol. 255] By Mr. McLean:

Q. And when you stated "we," you were referring to yourself as well as the Department?

A. I was.

Q. What College degrees do you have, Mr. Voorhees?

A. Yale University, Ph. B.

Q. How long has this Yonkers branch abandonment been under consideration?

A. The abandonment has been under consideration various times. This last study has been under consideration for about, I would say, nine or ten months. Several years ago, about 1938, we gave consideration to the abandonment and made considerable investigation and study.

Q. You are familiar with the return to the questionnaire that's been submitted in this case?

A. I am.

Q. Did you prepare a good part of it?

A. I did.

Q. And you have checked various statements contained in it?

A. I have.

Mr. McLean: Mr. Examiner, at this time I would like to proceed by drawing the witness' attention to various parts of the return to the questionnaire without repeating what is said, necessarily, in each part, but just amplifying it and having him explain various things. I have additional copies that I can supply to other parties interested, if that will help them, in following and will also shorten the proceeding.

[fol. 256]

By Mr. McLean:

Q. Calling your attention to page 2 of the questionnaire, the answer to the first question, which is marked 1-A, it is stated there that distance of the length of the line to be abandoned is 3.1 miles. Will you state how much of that mileage is located within the city of Yonkers and how much within the City of New York?

A. Yes, 1.7 miles is within the city of Yonkers and 1.4 miles is in New York City.

Q. What operations will be abandoned; that is, what train service?

A. The train service that will be abandoned will be the train service extending from Getty Square, Yonkers, to Sedgwick Avenue, New York.

Q. What is the distance that those trains operate over?

A. 7.8 miles.

Q. That includes the 3.1 miles to be abandoned in this proceeding?

A. Yes, it does.

Q. Will the tracks be abandoned beyond the limits of this line?

A. They will not; the tracks that will be abandoned are the 3.1 miles of the Yonkers Branch between Van Cortlandt Park Junction and Getty Square.

Q. Which are applicant's—which of the applicant's lines [fol. 256a] will continue to serve the city of Yonkers? Perhaps you could use an exhibit to explain that, Mr. Voorhees.

A. Yes.

Q. I show you a map, Mr. Voorhees, which is marked in the upper right hand corner as exhibit No. 2. Is that the same basic map as was attached to the return to questionnaire?

A. Yes, it is, except the copies that we have prepared now,—we have crossed out the exhibit No. 2.

*Exam. Schutrumpf: This will be marked as Exhibit No. 1 for identification.

(Exhibit 1, Witness Voorhees, marked for identification.)

By Mr. McLean:

Q. Will you explain the legend on that exhibit, Mr. Voorhees?

Exam. Schutrumpf: That is self-explanatory, Mr. McLean.

By Mr. McLean:

Q. Another map you have to mark for identification is the map of Manhattan and the Bronx, is that right?

A. Yes.

Mr. McLean: Will that be marked as exhibit No. 2, Mr. Examiner?

Exam. Schutrumpf: That is correct, exhibit No. 2 for identification.

(Exhibit 2, Witness Voorhees, marked for identification.)

By Mr. McLean:

Q. Using either of these exhibits, will you explain what other lines of the New York Central will continue to serve [fol. 257] the city of Yonkers, if the line in question is abandoned?

A. I will use exhibit 1 for that purpose. Referring to exhibit 1, the New York Central Lines, with the exception of the Yonkers Line, are shown in a heavy black line with cross markings. The Hudson Division of the New York Central is shown as running along the shore of the Hudson River and extends through Spuyten Duyvil, coming along the Harlem River and then through Spuyten Duyvil and northerly through Greystone, and on that line there are four stations within the city of Yonkers, namely, Ludlow, Yonkers, Glenwood and Greystone; then coming over easterly is the main line of the Putnam Division, from which the Yonkers Branch extends, and that is shown as extending from Sedgwick Avenue, New York City, northerly to Nepera Park on this map.

Within the city of Yonkers, on the Putnam Division Main Line are six stations: Lincoln, Dunwoodie, Bryn Mawr, Nepperham, Gray Oaks and Nepera Park; then coming over further east is shown the Harlem Division of the New York Central, coming up from a junction at Mott Haven, near 149th Street and extending northerly to Tuckahoe, which is the most northerly station shown on this map.

All these three lines extend down northerly beyond the map.

Q. The last line you mentioned, the Harlem, is just outside of the city of Yonkers, paralleling the easterly boundary [fol. 258] daries?

A. Yes, it runs very close to the easterly boundary of Yonkers.

Q. In fact, at one place it cuts across, does it not?

A. That is correct. On that line there are six stations within the city of Yonkers. I don't mean within the city of Yonkers, but very close to the easterly boundary line of Yonkers: Wakefield, Mt. Vernon, Fleetwood, Bronxville and Tuckahoe.

Now, these are in addition to the Yonkers Branch, on which are four stations, namely, Caryl, Lowerie, Park Hill and Getty Square within the city of Yonkers.

Q. When was the line to be abandoned electrified, Mr. Voorhees?

A. In 1926.

Q. What occasioned that electrification?

A. There was a public demand for the electrification and special legislation was obtained, state legislation was obtained, for it. It was the expectation that electrification would bring more business; it was expected that a greater number of people having their business in New York City would reside in Yonkers and utilize the electric service to travel back and forth to business.

Q. If this abandonment is permitted, how much electrical connections can be removed?

[fol. 259] A. The electrical facilities between Van Cortlandt Park Junction—I might put it this way: In addition to the electrical facilities on the Yonkers Branch itself, the abandonment will permit the removal of the electric facilities between Van Cortlandt Park Junction and Sedgwick Avenue.

Q. The tracks, however, upon which the trains run will remain?

A. They will remain for the purpose of handling the Putnam Division main line service.

Q. Will you describe the physical characteristics of the line to be abandoned, the part marked in red on exhibit 1, with respect to rail and ballast, bridges and so forth?

A. 80 percent of the line is laid with 105 pound rail and the remainder is 100 pound rail. It is a double track line. It is laid throughout with treated ties, cinder ballast. There are nine bridges carrying the railroad over streets and one bridge, namely, at Caryl, which carries the street over the railroad. This, I might say, is an unusual number of

bridges. It is due to the fact that the line runs through the—intersects the city streets.

Up at the northerly end, at Getty Square, there is a very sizeable viaduct which is about 780 feet long and rather high. The line is equipped with automobile block signals, with colored lights. The right-of-way is about 80 to 100 feet wide; generally southerly of Caryl.

[fol. 260] It would average about 60 feet wide to the north of Caryl except for the station grounds, where there is some additional space for station purposes.

Q. Are there retaining walls along certain portions?

A. Yes, generally speaking, this line, after it crosses McLean Avenue, which is between Lowerre and Park Hill, following—follows along a side hill rather steep on the easterly side and in the vicinity of Park Hill there is some retaining walls.

Exam. Schutrumpf: North from that point or south from that point?

The Witness: Generally north.

By Mr. McLean:

Q. What is the character of the line between Caryl and Van Cortlandt Park Junction in the city of New York?

A. The character of that line is much the same as the rest of it; that is, as far as the construction goes, the road bed and so on, except that there are a lesser number of bridges traversing Van Cortlandt Park, the city of New York, and there is not such a rugged topography encountered through there.

Q. It is fenced off from the park?

A. Yes.

Q. What kind of a fence?

A. With a so-called chain-leaf metal fence.

[fol. 261] Exam. Schutrumpf: I wonder if you have the number of total feet of bridges.

By Mr. McLean:

Q. Do you have that readily available, the total number of feet?

A. Let me just look a moment. No, I have it in tons, but I don't happen to have it in feet here.

Mr. McLean: We can calculate that.

Exam. Schutrumpf: Some time during the day, please.

Mr. McLean: I can supply that figure, the total footage of the bridges, as 1500. Mr. Chamberlain, one of our other witnesses, supplied that.

Exam. Schutrumpf: I see no objection to that. The viaduct is separate from that 1500 feet?

The Witness: I believe that includes the viaduct.

Exam. Schutrumpf: All right. You may proceed.

By Mr. McLean:

Q. Was there a former connection of this line over the Harlem River at Sedgwick Avenue?

A. Yes, there was.

Q. Will you describe that?

Mr. McLean: Mr. Examiner, I am amplifying the history under answer 2-A here.

A. This line, or in the vicinity of Sedgwick Avenue, the line formerly took a curve towards the west and went across the Harlem River over to connect at 155th Street with the Ninth Avenue Elevated, which has since been dismantled.

[fol. 262] By Mr. McLean:

Q. So that one of the early connections of this line was the 9th Avenue El?

A. Yes, that is right. I might add there that in 1916 a portion of the bridge which constituted the connection between this line and the Ninth Avenue El was turned over to the Interborough Rapid Transit and the portion that connected across from the east side of the Harlem River, coming around northerly to connect with the Putnam, was dismantled.

Q. So there is no longer a physical connection there?

A. No, there is no longer a physical connection.

Q. Referring now to answer 4-A in the questionnaire, it is stated that there has been considerable deferred maintenance. Will you explain what is meant by that?

A. I am wondering if we shouldn't have described these other lines on the exhibit.

Q. We will come back to that later.

A. Answering the question of deferred maintenance, while this line has been maintained adequately for safe

operation, it has not been maintained adequately to the extent of keeping up with current replacement in accordance with the life of the facilities, such as the rail and ties and particularly the ballast.

Q. What is the nature of the ballast?

A. Cinder ballast.

Q. What about the right-of-way fence through the park particularly?

[fol. 263] A. Well, in places the right-of-way fence is in the same condition and, with a normal maintenance program, would have been repaired in places.

Q. Turning now to answer No. 5, dealing with the salvage value, has there been any pressure exerted upon the railroad by the government authorities with respect to producing scrap metal?

A. Yes, around the early part of the year there was a very urgent demand on the part of the War Production Board, upon our railroad and the other railroads also, to do everything possible to find places where facilities might be abandoned so as to produce not only scrap metal but second-hand rail as well. The government has been very deficient in second hand rail for the purpose of meeting the requirements of cantonnments, defense industries, storage yards and so forth. They made it very clear that we would just have to do everything we could to dig up all possible places where material could be found.

We went to work and canvassed our territory and started in with something like 15 or 20 locations where the possibility was presented. This Youkers Branch appeared to be one of them.

Then we proceeded to investigate those places to determine whether or not abandonment should not be effected. [fol. 264] They have been continually after us. They really camped right on the back of my neck in regard to all these abandonments, pushing them along and expediting them as much as possible with the Commission.

Exam. Schutrumpf: I think that is enough on that.

By Mr. McLean:

Q. How many lineal feet of rail will be released here?

A. 65,000 lineal feet of rail.

Q. How much of the—how many of the bridges will be removed?

A. There will be eight bridges removed.

Q. One will remain?

A. Yes, one will remain.

Q. And which one is that?

A. That is the bridge that carries the tracks over the Henry Hudson Parkway in Van Cortlandt Park.

Q. Why will that one remain?

A. Well, that will remain because the New York City authorities, the Park Department, have stated that they would require that bridge for the purpose of permitting traffic between the portion of the park to the south of the Boulevard and to the north of the Boulevard.

Q. Referring to the item of miscellaneous, under 5-A, what does that consist of?

A. That consists of fences, pole lines and buildings principally.

Q. Yes.

[fol. 265] Now, I see you have some additional weights there to show.

A. Well, I wanted to bring out the fact that of that 1,162 gross tons of rail, 850 of it would be available for second-hand use and 312 scrap, and also the fact that that does not include the third rail.

Then, I don't think I mentioned the amount of—Well, that shows there the amount of tonnage in the bridges, 989.

Q. The last item listed there is 11 multiple electric cars. What are they?

A. Those are the cars that are used in this service on the Yonkers Branch and that—between the Yonkers Branch and Sedgwick Avenue, which, if the branch were abandoned, would be released for other service.

Q. Does the railroad have need for those multiple unit cars in other places in this vicinity; that is, in the New York area?

A. It does. They are very badly needed. At the present time we are using 24 standard coaches that are designed for steam operation and we find it necessary to use them in the electric division, on the Harlem Electric, because of a shortage of "MU" equipment.

Q. Meaning multiple unit?

A. That is correct, and if these "MU" cars were released, they would be put in service on the Harlem Electric [fol. 265a] and, in turn, release standard equipment which is very badly needed in other places, not only on our own

system, but we are obliged, under present conditions, to supply a very considerable amount of our coach equipment for military movement off-line our system.

Q. Approximately how many coaches of the New York Central are off-line for military use?

A. As of November 4th there were 236 coaches used off the line.

Q. Do you have the numbers of the trains that use the standard coaches on the Harlem Division?

A. Yes, No. 450 and No. 474, operating out of North White Plains, which is the northerly terminus of the Harlem Electric Division.

Q. Turning now to 7-A, will you describe the train service over this branch at the present time?

Mr. McLean: May we go off the record a moment, Mr. Examiner?

Exam. Schutrumpf: Yes.

(Discussion off the record.)

Mr. McLean: I offer in evidence the Yonkers Branch time table, effective November 1, 1942, showing the service on this line. If there is no objection, I offer the other two exhibits in evidence also.

Exam. Schutrumpf: Exhibits 1, 2 and 3 are received in —

[fol. 266]. (Exhibits 1, 2 and 3, Witness Voorhees, received in evidence.)

By Mr. McLean:

Q. Exhibit No. 3 shows the service now maintained on the line; is that right, Mr. Voorhees?

A. Is that effective November 1, 1943?

Q. That is right.

A. I might say that during the course of our investigation we were using the July issue, but I have compared it with this November 1st issue and there are very minor changes. They would only constitute within a minute or two minutes on certain trains.

Exam. Schutrumpf: No change in the number of trains?

The Witness: No, sir.

By Mr. McLean:

Q. What is the number of units operated per train?

A. On these 17 trains in each direction daily, except Sunday, being no Sunday service now. There are twelve 2-cars; four 3-cars; and one 4-car operations.

Q. Where do the passenger-transfer, the ones who use this line, to reach Grand Central Station?

A. Most of the transfers are effected at High Bridge. There are 15 trains making connection with Hudson Electric trains, 14 of those at High Bridge and one at University Heights.

Q. How is the transfer effected there?

A. There is an overhead bridge; that is, overhead the [fol. 266a] tracks, and the passengers depart—I am talking now about the eastbound movement, or southerly movement—the passengers leaving would leave the Yonkers Branch trains, alighting on a platform adjacent to that track, and then go on overhead on the bridge and come down onto the track adjoining the eastward Hudson Electric track.

Of course, in the opposite direction it is the same sort of an operation in the reverse.

Q. If these passengers use the Yonkers or Ludlow Station on the Hudson Division, would they get approximately the same seats as they do when they transfer at University Heights?

Mr. Gray: That is objected to.

Exam. Schuttrumpf. On what ground?

Mr. Gray: On the ground he isn't able to testify what seats they would get.

Mr. McVay: I join in that objection.

By Mr. McLean:

Q. Stated in another way, are the same accommodations provided at both stations?

A. You mean on both sets of trains?

Q. Yes.

A. They are. Naturally, these people traveling on the Yonkers branch and getting on the Hudson Electric trains at High Bridge or University Heights—we have to provide seating capacity for them on the Hudson Electric trains just as though they went over and boarded those trains in the first instance.

[fol. 267] Consequently, we have to provide two sets of equipment for these people, one on the Yonkers branch and one on the Hudson electric.

Q. Stated in the answer to Question 7 of the questionnaire is a statement that 71 trains were operated in 1926. Do you have a tabulation which will show the decline in the number of trains operated from 1926 down to the present time?

Mr. McAneny: Is that on the Getty Square branch?

Mr. McLean: Yes.

A. Yes, I do.

Q. Will you give the dates shown and the change in the number of trains operated, giving the combined number of trains in each direction on weekdays?

A. This begins with the schedule effective January 3, 1926, when there were a total of 46 trains weekdays; on April 25, 1926, there were 57; December 19, 1926, 71; December 13, 1931, 67; April 24, 1932, 65; August 8, 1932, 52; September 20, 1932, 53; April 30, 1933, 49; June 15, 1938, 43; September 25, 1938, 36; September 29, 1940, 34, and that has been maintained down to date.

I am giving the total; that is, the total of both directions.

Mr. McLean: Off the record a moment.

Exam. Schutrumpf: Off the record.

[fol. 268] (Discussion off the record.)

Mr. McLean: I offer in evidence Hudson Division time table, covering suburban service between New York and Peekskill, including Yonkers, effective November 1, 1942.

Exam. Schutrumpf: That will be received in evidence as exhibit No. 4.

(Exhibit 4, Witness Voorhees, received in evidence.)

By Mr. McLean: .

Q. Turning now to answer to question No. 8 of the questionnaire, you stated certain distances there between Caryl, Lowerre, Park Hill and Getty Square and stations on the other lines of the New York Central.

Have you checked those distances personally?

A. I have. I first had those distances scaled from the city map.

Q. The distances are correct?

A. Then I was going to say I checked those distances personally by automobile. I believe there are one or two minor corrections. Caryl and Ludlow is shown as 1.4 miles; when I checked that, I took the same route as the Nodine Hill bus and made it 1.6 miles.

Q. Instead of 1.4 as appears there?

A. That is right. Then there is one other: Park Hill to Lincoln, which is shown as 1.3 miles, by automobile I went via South Broadway, McLean Avenue and then swung into Van Cortlandt, Park Avenue, over Intervale Place and [fol. 269] McLean Avenue and made that 1.6 miles.

Q. Do you have an exhibit prepared, Mr. Voorhees, showing the passenger count on these trains shown in exhibit 3 for certain days during the last year?

A. I have.

Mr. McLean: I offer the exhibit entitled, "New York Central Railroad Company, Yonkers Branch, trains and revenue passengers," evidence.

Exam. Schutrumpf: That will be received as exhibit No. 5.

(Exhibit 5, Witness Voorhees, received in evidence.)

By Mr. McLean:

Q. This exhibit consists of nine sheets, the top sheet being a summary. Will you tell the dates upon which train count took place, Mr. Voorhees?

A. The dates are shown there.

Q. What dates—what days of the week were they?

A. They were Tuesday and Wednesday in each case.

Q. Why were two days taken?

A. I thought it would be a little more representative to take two days rather than one.

Q. Then the detail for the count on each day is shown on the sheets which are attached; is that right?

A. Yes, that is correct.

Mr. McAneny: Those are all received subject to cross-examination, Mr. Examiner?

Exam. Schutrumpf: Absolutely.

[fol. 270] Mr. Voorhees, will you tell us why you picked out May, June and October?

The Witness: It happened to be the time when we were either making our study or, when we came along to our

most recent study in May, 1942, we already had made a count at a previous study for May, 1941 for those two days, so we thought, for comparative purposes, it would be desirable to take, as near as we could, the same two days in May, 1942. Then as our study developed, we were approaching, as we expected, an abandonment proceeding because everything was turning out that way. As we got a little nearer to the time, we took two days again in June, 1942 and then, finally, when we received the notice as to when we would be heard on this case, we thought it would be desirable to get as near up to date as possible, so that accounts for the October figures.

Mr. McLean: As long as we have the names of these stations and distances in front of us, it would be well to put in further exhibits showing the fares between these stations and New York City.

I offer for identification, as exhibit No. 6, an exhibit entitled, "The New York Central Railroad Company, one-way, round trip, commutation, 12 and 26 trip fares, also optional privileges."

Exam. Schutrumpf: That is marked for identification as Exhibit No. 6.

[fol. 271] (Exhibit 6, Witness Voorhees, marked for identification.)

By Mr. McLean:

Q. These are the present fares in effect between the stations as marked?

A. They are.

Q. The tariff references are shown in the notes, I believe?

A. That is right.

Q. Turning now, Mr. Voorhees, to answer to question 10, certain alternate methods of transportation are shown there. Will you show the location of the Broadway Avenue trolley line referred to on the bottom of page 6, by using the map, exhibit 1?

A. On exhibit 1, the trolley lines are shown in a light black line, colored in yellow. The Broadway line is shown as extending from Getty Square southerly just a short distance to the west of the Yonkers Branch and extending on southerly into New York City and connecting with the Broadway subway at 242nd Street. The subway lines are shown in a solid heavier black line on exhibit No. 1.

Q. It passes the Broadway end of the Broadway Subway at 242nd Street?

A. That is right.

Q. Now, the next trolley line you mention on the top of page 7, in answer to question 10, is the McLean Avenue trolley line. Will you show where that is, using exhibit 2, [fol. 272] which is the city map? I think that appears more clearly there. Will you explain where the McLean Avenue line runs from that map?

A. On exhibit No. 2, it runs from an intersection with Broadway.

Q. That would be in the upper left hand corner of the map, would it not?

A. Yes, just a little to the west of the Yonkers Branch, about midway between Lowerre and Park Hill Stations, and then it runs over easterly, passes overhead the Putnam Main Line at the Lincoln Station and swings on around the Central Avenue, which extends from McLean Avenue southerly into Jerome Avenue, and that, in turn, connects with the Jerome Avenue subway near the point where Bainbridge Avenue connects.

Q. That's just below Woodlawn Cemetery there?

A. That is correct.

Q. Now, the next line you mention is two bus lines known as the Park Hill and the Nodine Hill Lines. Will you explain where those lines come? I think exhibit No. 1 is the most useful for that purpose.

A. Exhibit No. 1 shows the bus lines in a light black line, with dots on it, and then colored green. Exhibit 1 does not distinguish between the two bus lines; that is, the Park Hill route and the Nodine Hill, both of which operate to and [fol. 273] from Ludlow and the territory to the east.

Q. Is it generally true to say that those two bus lines begin at the Ludlow station on the Hudson and go in a T-shaped route to the Yonkers station on the Hudson?

A. Yes, that is generally a correct statement.

Q. How close does that bus line come to the Caryl—or one of the bus lines come to the Caryl station?

A. The Nodine Hill bus line goes right past the Caryl station.

Q. And affords a direct connection to the local station?

A. That is correct.

Q. Now, as to the Lowerre station, how close does the line come there?

A. The Park Hill bus line goes through Van Cortlandt Park; past Lawrence Street, and is within about a half block, at the corner of Lawrence and Van Cortlandt Park, of the Lowerre station; and then that bus line also connects from there to the Ludlow station.

Exam. Schutrumpf: We will recess for a few minutes.

(Thereupon, a short recess was taken.)

Exam. Schutrumpf: Let us resume, please.

Mr. Garrity: In resuming, may we have it noted on the record that a great number of citizens of Yonkers who came here to attend the hearing have left and that we would like it noted that a great many of them expressed a desire to be [fol. 274] heard? However, under the procedure it is necessary for them to wait their time and we hope that they will be able to come back and be heard by the Commission.

Exam. Schutrumpf: That statement may go on the record with the added statement by the Examiner that he will be here tonight if they want to come back.

Mr. Garrity: I understand that.

Mr. McLean: And I think there is some qualification as to the meaning of the word "great" and "great number."

Exam. Schutrumpf: Will you proceed. However, I will announce at this time that there will be a night session commencing at eight o'clock this evening.

Mr. McLean: I offer in evidence a two-page exhibit showing a schedule of the Club Transportation Company, which operates the Park Hill and Nodine Bus Line, which the witness has already described.

Exam. Schutrumpf: That will be received as Exhibit No. 7.

(Exhibit No. 7, Witness Voorhees, received in evidence.)

By Mr. McLean:

Q. Have you made a calculation, Mr. Voorhees, of the additional time, if any, and additional expense, if any, that the passengers using this line would encounter in getting to New York destinations?

A. Yes. May I first describe on exhibit No. 2 certain of these routes?

[fol. 275] Q. Yes. Perhaps that would make it easier to understand what you are about to say in connection with the time element.

A. In exhibit No. 2 I have shown the Yonkers branch, which is in the upper left hand corner of the map, in a heavy black line and indicated the stations at Caryl, Lowere, Park Hill and Getty Square. The other New York Central Lines, which I have heretofore described, are shown in a solid black line, which is lighter than the Yonkers branch. This map shows our Hudson & Harlem Divisions, extending to the junction in the vicinity of 149th Street and then on down to Park Avenue to the Grand Central Terminal at 42nd Street.

Sedgwick Avenue is shown, High Bridge, University Heights. Just south of Sedgwick Avenue is shown a solid black line running generally in an easterly and westerly direction. That is a shuttle extending from the Lexington Avenue subway, on the east, past Sedgwick Avenue and then across the Harlem River westerly to 155th Street.

Southerly of 155th Street I have shown a dashed black line which represents the former location of the Ninth Avenue Elevated, and that extends on south, swinging over from 8th Avenue into Columbus Avenue, and then there is also shown the connection at 53rd Street running easterly over to 6th Avenue, and then the both lines—the former location of those two Els, both the 6th Avenue and 9th Avenue, which have been dismantled, is shown going on all the [fol. 276] way downtown New York.

Q. Do you have the dates upon which those lines were dismantled?

A. The last day of service on the 6th Avenue El was December 4, 1938; the last day of service on the 9th Avenue El was June 11, 1940. Since the cutting off of the El at 155th Street, it is now necessary for passengers that travel on that shuttle I mentioned—a few of them consisting of Yonkers Branch passengers—transferring from Yonkers branch trains to the shuttle at Sedgwick Avenue. It is necessary for them to go down from the elevated station to the street level and then down again into the 8th Avenue subway.

The 8th Avenue subway is shown here in the legend. There is a designation for the subway lines. Note that the designation in pink or red dot lines, Independent System, is the symbol in which this 8th Avenue Line is shown. That extends on down 8th Avenue and at the vicinity of 59th Street there is a connection with the 6th Avenue Line, so passengers traveling south of New York City may, for ex-

ample, ride on the 8th Avenue trains to the intersection of 42nd Street and 8th Avenue, or they may ride on the trains that route via both 8th Avenue and 6th Avenue to Times Square.

Now, there is also shown on this map Broadway, on which is located the Broadway trolley heretofore described, connecting with the Broadway subway at 242nd Street, Van [fol. 277] Cortlandt Park.

The Broadway subway is shown in a solid red line extending on southerly to downtown Manhattan, including Times Square.

Q. I think you have laid the proper foundation now, Mr. Voorhees, for giving the time in transit and the expense, using the various routes. Take the present route for people coming from the Yonkers branch to Grand Central, transferring at High Bridge. Will you explain the time that takes, how you calculate it, and the cost?

A. I have made some comparisons between the station at Lowerre and the Grand Central Terminal, or Times Square. This first route, namely, the present route from Lowerre on the Yonkers Branch to the Grand Central Terminal, consists of a ride on the Yonkers branch to High Bridge, 12.1 minutes. That's the average time of all the scheduled weekday trains.

Mr. McVay: From where to where?

The Witness: From Lowerre to High Bridge.

By Mr. McLean:

Q. How long a wait for connection do you calculate there?

A. I have allowed 9.6 minutes wait for connection, and that's based on the average time of all the scheduled trains that make connection with the Hudson Electric trains. Then the time on the Hudson Electric from High Bridge to the grand Central Terminal is 18.5 minutes.

[fol. 278] Q. Making a total time of what?

A. Of 40.2 minutes.

Q. What is the cost?

A. I have used a cost of 16 cents, which is the monthly commutation fare divided by 52. I used 52 in order to exclude Sundays.

Q. Now, what would be the alternate route that people would take in the event of the abandonment to reach Grand Central?

A. I would say the most feasible alternate route would be to take a bus to the Ludlow station, and I have that time as eight minutes, based on a trip that I myself took, or several trips.

Q. From where?

A. From Lowerre or from boarding the bus right near Lowerre, at the corner of Van Cortlandt Park Avenue and Lawrence Street, to Ludlow, and then the average time on the Hudson Division train from Ludlow to Grand Central Terminal is 29.4 minutes, a wait for connection of five minutes.

Q. That's at Ludlow after you get off the bus?

A. That is correct.

Q. What is the total time there?

A. 42.4 minutes.

Q. What is the cost of that?

A. The cost there is 5 cents on the bus and 17 cents on the Hudson Division train, which again is the commutation [fol. 279] —is, the monthly commutation fare divided by 52.

Q. So on this route, the alternate method is approximately two minutes longer and costs six cents more?

A. Correct.

Q. Is there another alternate method that could be taken instead of going to Ludlow Station?

A. There is.

Q. What method is that?

A. That would be Broadway trolley, which may be boarded at the corner of Lawrence Street and Broadway, within a short distance of the Lowerre Station, and that trolley trip, by actual experience, requires ten minutes.

Exam. Schutrumpf: What is ten minutes?

The Witness: The trolley trip on Broadway. We are always starting at Lowerre.

Exam. Schutrumpf: When you say a short distance, what do you mean by short?

The Witness: I will give you that distance. That is 18 miles.

Exam. Schutrumpf: From where to where?

The Witness: From the Lowerre station to the corner of Lawrence Street and Broadway. That's about three blocks.

By Mr. McLean:

Q. And you said it was ten minutes after you get on the trolley to 242nd Street subway,—after you get on the trol-

ley to 242nd Street, where they get the subway; is that [fol. 280] right?

Mr. McAneny: But you haven't got them on the trolley yet, have you?

The Witness: Yes, I have. I am allowing a waiting time.

Mr. McAneny: I mean, are you showing here that at the peak hours that there's trolley capacity to carry these people?

Mr. McLean: That comes later. I have a witness from the Third Avenue Street Car Company that will explain that situation.

By Mr. McLean:

Q. All right, Mr. Voorhees, will you proceed?

A. Then on the Broadway subway to 225th Street, which is Marble Hill on the New York Central, Hudson Division

I think I showed that on exhibit 2. Yes, I have labeled that on exhibit 2, Marble Hill. That's at the Harlem River, 225th Street. That's a five-minute trip. Then the Hudson Electric train from Marble Hill to Grand Central Terminal, average time of 25.1 minutes, waiting for connections, including a wait at Lawrence Street and Broadway, a wait at 242nd Street between the trolley and the subway and a wait at Marble Hill between the subway and the train—ten minutes.

Q. That's the aggregate waiting time?

A. That is right.

[fol. 281] Q. Making a total of how many minutes?

A. 50.1 minutes.

Q. And what is the total expense computed in the same way as before?

A. That is 23.9 cents.

Q. Practically 24 cents?

A. That is correct.

Mr. Gray: Did you say the time on the subway from 242nd Street to Marble Hill?

The Witness: Five minutes.

By Mr. McLean:

Q. Is there any other alternate method?

A. Yes, the Broadway trolley again starting the same way, at Lawrence Street and Broadway, to 242nd Street.

ten minutes; and then the Broadway subway all the way to Times Square, 37 minutes; then the shuttle from Times Square to Grand Central Terminal, five minutes; waiting time, five minutes, making a total of 57 minutes for that trip and the total cost is ten cents.

Q. And when you speak of the shuttle between Times Square and Grand Central, it isn't the same shuttle you mentioned up here at Sedgwick Avenue? It is a different shuttle; is it not?

A. That is right, the subway shuttle. I haven't made a comparison with this present route via 155th Street.

Q. Perhaps you had better do so now.

A. Using Lowerre still, the Yonkers branch to Sedgwick [fol. 282] Avenue, 14 minutes; shuttle from Sedgwick Avenue from 155th Street, where, as I have explained, connection may be made with the 8th Avenue subway, five minutes; 8th Avenue subway to 42nd Street and 8th Avenue, 21 minutes, walk from 8th Avenue subway to Times Square of five minutes.

As far as Times Square is concerned, that's a total time of 45 minutes and a total cost of 15.6 cents.

Q. That is under the present arrangement with this line in operation?

A. That is right.

Q. Now, if the line is not in operation, what would be the route and the total expense?

A. Well, I covered those via the three different routes that I described.

Q. You covered it with respect to going to Grand Central Terminal by way of the shuttle, so you would only have to deduct five minutes from that time in order to get the Times Square time?

A. Yes, or the other way around—if you took the bus to Ludlow and then to Grand Central and you wished to compute the time to Times Square, you would add five minutes to that 42.4 which I described, or it would be 47.4 minutes.

Q. Turning now, Mr. Voorhees, to answer to question 12, there is a reference to exhibit 5. Will you turn to exhibit 5 in the back of the questionnaire and explain that? Under [fol. 283] the heading of "local," in exhibit 5, page 20, you have included merely the passengers between stations on the line to be abandoned; is that correct?

A. That is correct.

Q. Then under the Putnam Division you have given credit for the revenue earned on the balance of the Putnam Division?

A. That is correct.

Q. And so forth, in connection with the notes as shown. Will you tell us the percentage of the local business as a whole, using 1941?

A. Pardon me, before I do that may I explain, just to carry out the thought a little further, that exhibit 5 also credits to this service we are contemplating abandoning the revenue derived from the entire haul of these passengers all the way to the New York City stations; that is, 125th Street, 138th Street and Grand Central.

Q. The total appearing in the right hand column, then, is the total revenue secured by the Central for the entire transportation to destination at Grand Central, or wherever else they go on the New York Central System there?

A. That is correct, on the assumption that all of those passengers and all of those revenues would be lost in the event of abandonment.

Q. Turning now to the question of percentages, what percent of the traffic is purely local?

[fol. 284] A. 2.4 percent.

Q. And of the connecting line, how much would be attributed or allocated to the Putnam Division under No. 1?

A. Under No. 1, which is the Putnam Division excluding Sedgwick Avenue, that is 11.3 percent.

Q. And Sedgwick Avenue?

A. 23.4 percent.

Q. And the Electric Division there—is that the same as we have been calling the Hudson Division?

A. That is correct.

Q. What is that?

A. 62.9 percent.

Q. Indicating that approximately 63 percent of the passengers go down to Grand Central and a certain portion of them could be expected to continue to use other lines of the Central?

A. That is correct. I might add also that these percentages I am giving are for the year 1941.

Q. Now, have you some additional figures that could be added to the three months' period? At the time this ques-

fionnaire was prepared, there were three months available. Are the six months' available now?

A. Yes, they are.

Mr. McLean: I think it would be useful to write those in on the exhibit, Mr. Examiner.

By Mr. McLean:

Q. Just following over the columns without identifying [fol. 285] them, and beginning with the first column under local number of passengers, what is that for the six months' period of 1942?

A. 3,735.

Q. Revenue?

A. \$371.

Q. The next column, number of passengers.

A. 19,833.

Q. The revenue?

A. \$2,165.

Q. The next column, the number of passengers.

A. 36,674.

Q. The next column, revenue.

A. \$5,027.

Q. Next column, number of passengers.

A. 101,359.

Q. And the revenue?

A. \$16,931.

Q. Total number of passengers.

A. 161,601.

Q. And the total revenue?

A. \$24,495.

Exam. Schutrumpf: I have overlooked the fact that we have numbered exhibits in the return. I will have to ask all of you to go back and put the letter "H" in front of it [fol. 286] so that if any discussion comes up later, we will be sure that we are talking about the same number.

(All previous exhibits should be preceded by the letter "H.")

By Mr. McLean:

Q. Turning now to question 14, the answer appearing on page 11, you have there shown the revenue as divided be

tween the branch and the other points on the applicant's system?

A. Yes, that is correct.

Q. That is prepared in accordance with the questionnaire dividing up the revenue; is that right?

A. That is correct, prepared from ticket sales and conductors' cash sale receipts.

(Mr. McLean: I am going to pass that for the time being. If any one has any questions or difficulty with it, they can take it on cross-examination.)

By Mr. McLean:

Q. Turning now to paragraph "D" of 14, dealing with the annual expense of operating the line proposed to be abandoned, you have shown under "D" the maintenance expenses connected entirely with the segment to be abandoned?

A. That is right.

Q. The item for maintenance of way and structures appears as \$16,400. Will you explain how that was determined?

A. That is based on the actual expenditures for maintenance of way and structures for a 7 $\frac{1}{4}$ year period. Those [fol. 287] are the years 1934, 1935, 1936, 1937, 1940, 1941 and 1942.

Q. Did you not start with 1933, Mr. Voorhees?

A. I should have started with 1933, yes, so that would make it five years, 1933 to 1937, inclusive, and then 1940 and 1941, plus three months of 1942. I might say that there was no attempt at hand-picking in these years. The reason for these years is that at the time we were making the study of a few years ago, the Commission required expenditures for a five year period.

Subsequently, as I understood it, in order to expedite such proceedings, they have required two years plus as much of the current year as might be available at the time, so that we had obtained the actual expenditures for maintenance for the five years, and then, when we got into this later study, we got together the two years and a quarter. That accounts for these particular years.

Q. Would you consider them as being fair years for the purpose of estimating normal maintenance?

A. Well, I do on the conservative side. I think, though, that they are extremely conservative.

Exam. Schutrumpf: Suppose you give us the actual figures for 1940 and 1941.

Mr. McVay: How are we to determine what is conservative?

Mr. McLean: I will bring that out.

Exam. Schutrumpf: In 1940 and 1941, give us the actual [fol. 288] figures.

The Witness: Are we talking about just the Yonkers branch itself?

Exam. Schutrumpf: I am talking about that \$16,400.

The Witness: In 1940 the actual was \$16,286; in 1941 the actual was \$23,817.

Exam. Schutrumpf: Any explanation for the difference between the two years?

The Witness: The principal difference is in the item of account number 208—bridges, trestles and culverts. There was a little more painting work on bridges done during that year 1941 than in some of the other years. The difference in the account I have just mentioned is about \$5,900. There is a little increase in track laying and surfacing, about \$800; and in station and office buildings there is an increase of about \$900.

Exam. Schutrumpf: I think that's enough on that.

Mr. McAneny: Just at that point, was there anything in that involved in grade crossings elimination?

The Witness: No, sir.

Exam. Schutrumpf: Will you proceed, Mr. McLean?

By Mr. McLean:

Q. You have an item there for replacing of ties?

A. Yes, I do.

Q. Will you comment on that if the figure is readily available?

[fol. 289] A. The average that we use for tie replacement per year is \$648. Shall I go on and indicate my view about that?

Q. If you care to, yes.

A. Those tie replacements, as I have indicated earlier in discussing deferred maintenance, are not sufficient to take care of the cycle of tie replacements required, measured by the life of these ties. Therefore, that figure is conservative.

Exam. Schutrumpf: Do you have any definite figures to offer under maintenance?

The Witness: Yes, I can give something reasonably definite on that. I have estimated here that, had the normal maintenance, based on life and adequate upkeep been carried out, I would have spent more money on the item of ties, a little bit on rail, ballast particularly. There's been very little ballasting done on this line, track laying and surfacing and fence replacements.

Those all add up to \$5,000, a year. Now, I might say that

By Mr. McLean:

Q. That is more than the figure you have here?

A. Yes. I might also add that that doesn't take into account so-called depreciation and, particularly in talking about depreciation I have in mind bridge structures which, as I said, are numerous on this line. If this line was to be [fol. 290] retained, a day of reckoning would come when these bridges would have to be replaced.

These figures that we are dealing with here have to do with the current upkeep, like deck replacements and painting, but not renewal.

Exam. Schutrumpf: You are saying that your under-maintenance figure is \$5,000, and some dollars a year?

The Witness: Yes.

Exam. Schutrumpf: For how many years?

The Witness: I am just stating that as a figure to compare with the average maintenance that I have used in this period.

Exam. Schutrumpf: That's not the difference, then? That's not the amount of the under-maintenance?

The Witness: Oh, no. If you were going to catch up, that would be something else again.

By Mr. McLean:

Q. That's not a rehabilitation figure?

A. Oh, no.

Q. Turning now to the item of transportation, as subparagraph "D" of 14, crew wages to be saved in the event of abandonment—how has that been calculated?

A. That is based on the actual crew wages that would be saved if this operation was to be abandoned. In other words, it takes into account just what employees in the transportation service would be taken off this service, and

[fol. 291] in certain cases, overtime that is spent of this service of crews that are operating on the Putnam Division and the Yonkers Branch of the Putnam Division.

Mr. McLean: I may say at this point that I have the superintendent available who made the actual calculations and knows the detail of this, perhaps, better than Mr. Voorhees, so if any cross-examination is wanted on this item, I will supply the superintendent for that purpose.

By Mr. McLean:

Q. Turning now to item "E," the railway tax accruals, and an item of \$34,557; do you anticipate that if this line is abandoned, that that tax item will be eliminated entirely?

A. I do. Those are the actual taxes payable in the year 1942, based on the 1942 tax rate, I should say.

Q. Is that based upon the theory that the land will be disposed of or will revert to owners of the underlying fee?

A. Yes, it does, and that takes into account both the taxes in the city of New York and the city of Yonkers.

Q. Item "F" showing income received from short-term leases, you have calculated that that item will be lost as an item of revenue?

A. Yes, I have.

Q. Now, paragraph "G" explains the cost of moving traffic over the line from Van Cortlandt Park Junction to Sedgwick Avenue. That is the portion that the service [fol. 292] will be abandoned as far as this branch is concerned, but the service will continue over those tracks by regular main line Putnam Division trains; is that right?

A. That is right. In other words, we have credited this operation with all the revenues all the way to Sedgwick Avenue, and we have debited the operation with the strictly out-of-pocket expenses for performing the service between Getty Square and Sedgwick Avenue, but these items in paragraph "G" only relate to such items as would be saved in the abandonment of that service.

Exam. Schuttrumpf: Your first item, \$6,317, estimated maintenance of way, normal maintenance, that would be beyond the branch?

The Witness: Yes.

Exam. Schuttrumpf: I would like to have some basis for that estimate.

The Witness: That largely consists of a saving in the maintenance of these power transmission facilities, such as the third rail, and we have done the same thing of taking the average for this seven and a quarter year period in regard to that item.

Exam. Schutrumpf: You are not charging against the handling of this traffic any maintenance of way that is chargeable to steam operation?

The Witness: No, sir, I am leaving that all alone, so [fol. 293] that—I am leaving that all alone, so that that would have to continue anyway.

By Mr. McLean:

Q. Turning now to the summary on page 13 in the return to the questionnaire, you have summarized there the net saving to the company resulting—the net annual saving resulting from the abandonment of this branch and the service thereover?

A. I have.

Q. Does that take into consideration the probability that some of this traffic will be diverted to the company's other line at Ludlow or Yonkers?

A. No, sir; that does not. As I stated, we have credited all the revenue earned on the haul of these passengers between Getty Square and Sedgwick Avenue and between Getty Square, High Bridge Transfer and the New York City stations: 125th Street, 138th Street and Grand Central Terminal. We have not debited any expense on the haul of these passengers from the transfer point—or between the transfer point at High Bridge or University Heights and the New York City stations.

We have done that on the assumption that this Yonkers branch traffic is handled in those trains as fill-in business and that those trains would run in any event, whether this service were discontinued or not. I have said that we have to supply two sets of equipment: If it should happen that we wouldn't get a certain number of these passengers over [fol. 294] on the Hudson Division, it may possibly be that we could eliminate some cars, and I have taken no account into this estimate of expenses saved.

Q. Turning now to the answer to question 15-A, you state that the business now handled is about 25 percent of that handled 12 years ago. What is your basis for that? You

have made a study of the commutation revenue over a period on this line, is that right?

A. Yes, I have made a study of the commutation and multiple trip business in this line from the period 1928 to date.

Q. Isn't it true that there has been some increase in business, commutation generally, in the New York area since the beginning of the war; is that right?

A. That is true.

Q. What is the percentage of increase in the business, commutation business, of the Hudson and Harlem Divisions?

Mr. McAneny: Does this include all intermediate stations?

Mr. McLean: It is the total commutation revenue on the Hudson and Harlem Divisions, and I am going to compare it with this one—compare the increase. There has been an increase in business and I want to show how much it has been.

Mr. McAneny: Does that include commutation between intermediate stations—between the terminus of the commutation route and the Grand Central Station?

By Mr. McLean:

Q. Does it, Mr. Voorhees?

[fol. 295] A. No, sir, these are the riders in and out of Grand Central Terminal.

Q. What does that show—what increase does that show for the two main commuting lines: The Hudson and the Harlem?

A. I have a comparison of those two lines for the seven months of 1942 with the same seven months of 1941, which shows an increase of 12 percent.

Mr. Gray: Where?

Mr. McLean: Hudson and Harlem combined.

By Mr. McLean:

Q. What increase is shown on this line?

A. On this line the increase was 2.87 percent. That is based on this study of commutation and multiple trip tickets.

Mr. Gray: That is between 1941 and 1942?

The Witness: Seven months, yes.

Mr. Gray: The same period?

The Witness: Yes.

Exam. Schutrumpf: The first seven months, I assume?

The Witness: That is right.

By Mr. McLean:

Q. Is there anything else that you want to include, Mr. Voorhees, that we haven't covered?

A. I did have a comment to make about those routes, where you had me compare the time and the cost. I talked about the comparison from Lowerre and we discussed taking the Broadway trolley to 242nd Street and then the Broadway subway to 225th Street, at the New York Central Marble Hill Station.

[fol. 296] There's modification of that for passengers traveling from the Caryl territory, namely, they could get on the trolley at the New York City line, which is near Caryl, and they could ride on that trolley all the way to 225th Street without making transfer to the subway, and thereby eliminate a five cent subway fare.

Then, I might call attention to the fact that passengers using this route via the Broadway subway and destined for downtown New York could stay right on the subway for the trip downtown, whereas now it is necessary, in coming to the Grand Central Station, to transfer to the subway in order to go on to downtown New York.

Mr. McLean: You may cross-examine.

Cross-examination.

By Mr. McAneny:

Q. There are a few general questions that I would like to ask with respect to the nature of this line. What is the size of the passenger trains that you are operating on this line, the Getty Square branch?

A. I gave those. Those of them, out of these 17, there were twelve 2-car, four 3-car and one 4-car.

Q. Well, that includes the operating car, does it not?

A. Yes, that is correct.

Q. That is the "MU" car?

A. Yes.

Q. And an "MU" car is designed to carry passengers; is [fol. 297] that right?

A. That is correct.

Q. Somewhat in the nature of a trolley car, isn't it?

A. Well, somewhat.

Mr. McLean: Each one is independent.

The Witness: Yes.

By Mr. McAneny:

Q. Well, now, you could operate trains of greater length; could you not, on this line?

A. Yes.

Q. It is physically possible?

A. Yes.

Q. And it also would be physically possible to operate trains carrying freight, wouldn't it?

A. No, you would have some trouble there because these bridges are pretty light-loading. We can't handle a locomotive on this line.

Q. You can't handle locomotives?

A. No, sir.

Q. But you could handle freight if it were carried and propelled by electric operation?

A. MU car?

Q. Yes.

A. A little bit, very moderately.

Q. Well, why couldn't you carry freight through such an operation?

[fol. 298] A. Well, as I said, we could carry a little, up to the extent that an "MU" car could haul it.

Q. Or up to the extent that any electrically operated engine would haul it?

A. As I say, these bridges are too light for a locomotive.

Q. It is just a question, then, of the reinforcement of the bridges?

A. Yes. I don't like the way you say "just." There is a lot of expense there.

Q. I am trying to find out on the record what the value of this line would be as a freight carrier.

A. I would say it would be very little because, in the first place, there are no industries on this line, no freight traffic to be carried.

Q. Any other reasons?

A. The other reasons are, as I have stated, you have got a line that's not built for freight. You have got a line that is built primarily for commuter passenger business.

Q. In what way would it be incapable of carrying freight?

A. In the way I described—that the bridges are not designed heavy enough for freight operation.

Q. You mean the bridges that traverse the city streets?

A. That is right.

Q. Those that you described?

A. That is right.

[fol. 299] Q. But they could be made capable of carrying it?

A. They could be made so at a very considerable expense.

Q. Well, they could be made capable of carrying freight?

A. I just answered that, I believe.

Q. You say at a very considerable expense.

A. Yes, I would like to leave that in the answer.

Q. But you don't say to what extent the expense would reach?

A. I have had no occasion to make an estimate of that.

Q. Now, on this Getty Square branch, would it be possible to operate a shuttle service, we will say, a one-way service?

A. You don't mean during the whole day, I take it?

Q. Well, during a portion of the day.

A. As shown by this exhibit 5 here.

Q. I mean physically possible?

A. I believe it would be physically possible. There are some objections.

Q. Well, then, I mean to say a service which operates a shuttle, just as the subway does at Times Square and Grand Central—running back and forth? That would be possible?

A. Yes.

Exam. Schutrumpf: Between what points do you mean?

Mr. McAneny: I mean between Getty Square and the terminus of the line at Sedgwick Avenue.

The Witness: It would be possible; I wouldn't say it would be feasible.

[fol. 300] By Mr. McAneny:

Q. Then in connection with such a shuttle service, it would be possible, at the peak hours, to operate trains of more than one car, would it not?

A. Yes.

Q. If such service was inaugurated, it would mean the need for less "MU" cars; would it not, if it was inaugurated?

A. I would have to make a study. I doubt that. I would have to make a study of that. I don't believe you would be able to release cars.

Q. Well, you certainly would if you operated a shuttle exclusively, wouldn't you?

A. That is right, and we wouldn't handle the business.

Q. If you were to operate a few additional trains at peak hours, use more cars, that would be a matter of calculation, wouldn't it?

A. That is right.

Q. Has the railroad ever considered making a direct connection at High Bridge or at points closer to Grand Central station with the New York Central and Hudson River Line?

A. Yes, we have.

Q. That's physically possible?

A. It is physically possible as far as constructing the connection is concerned, but it is not physically possible to handle the business through our Park Avenue line into Grand Central because that capacity is entirely used up.

[fol. 301] Q. You mean to say that the time table for the entrance and leaving of trains into the Grand Central Station would not permit it?

A. Yes, I mean to say that the use of those tracks, that four-track roadbed, by scheduled trains and dead-head trains; we call them; going to and from our Mott Haven Storage Yard, uses, together with the New Haven Railroad trains, uses up the capacity so as not to permit the taking on of these Yonkers Branch trains.

Q. Well, how many trains discharge passengers during the peak hours in the morning at High Bridge?

Mr. McLean: I might say that I have the superintendent here, who is more directly familiar with this operation. Mr. Voorhees can get it by digging it out of the schedule, but I think the superintendent would be much better and

we would expedite the case if you wait until he comes on. I will present him.

Mr. McAneny: All right, I will do that.

By Mr. McAneny:

Q. Now, you have given certain testimony with respect to possible alternative bus routes. Of course, as a railroad man, you know that there have been orders issued for curtailment of bus operation throughout the country; is that right?

A. Yes.

Q. Of course, the operation of buses is dependent upon the rubber tire situation, is it not?

[fol. 302] A. Yes, to a considerable extent.

Q. So that we might always face the possibility of elimination of bus routes, which would not present the same situation with regard to railroads because they don't use rubber for the operation of their cars; isn't that so?

A. No, I wouldn't go along with that statement. I might say that—

Q. Well, your railroad cars certainly don't operate on tires, do they?

A. That is correct.

Q. Well, that's all I had in mind—just to bring out that fact.

A. I had something else in mind about that. We did understand about these plans for curtailment of bus mileage on account of the rubber tire situation, and we have conferred with representatives of the bus companies here and also with the Motor Vehicle Division of the Office of Defense Transportation in regard to it. I was told by the head of that Division that it is true they desire to curtail bus mileage and are working it out in various places now. However, on the other hand, there might have well been a special situation like this one, that would deserve consideration, special consideration and would be dealt with on its merits.

Q. On the other hand, if the facts disclose that there was a [fol. 303] railroad operation going on which could take care of bus operations, take care of passengers on buses, might it not be that the decision would be to eliminate the buses rather than the railroad?

A. Not necessarily.

Q. I don't say necessarily, but still there is a chance of that, isn't there?

Exam. Schutrumpf: Both of you are talking about something which neither one of you can foresee.

Mr. McAneny: That's exactly it, Mr. Examiner. I think there are a lot of things in this situation that cannot be foreseen, which is one of my main arguments for the continuance of this line.

Mr. McLean: It happens that the statute deals with both present and future public convenience and necessity, but we have to confine our inquiry to what can be anticipated, not what is merely possible.

Mr. McAneny: I know that, but haven't you, in this and other proceedings, introduced evidence as to your future operations and future demands on your line? Well, I am not cross-examining you. That's all the questions of a general nature that I have to ask and I think that perhaps the representative of the Public Service Commission would like to proceed on the exhibits.

Mr. McVay: I was wondering if there are going to be more witnesses offered by the company to supplement the [fol. 304] testimony of Mr. Voorhees. Wouldn't it be better for us to wait until they have completed their case?

Mr. McLean: We have completed our case in so far as the testimony here is concerned. Mr. Voorhees has covered our entire case. We put in all our exhibits. However, I have an operating man here that I am tendering for cross examination and I have a representative of the street car company and the bus company here to testify directly. I would suggest you proceed with Mr. Voorhees and, if he cannot satisfy you, if it gets into details that have been supplied to him by other people, I will produce those people.

Mr. McVay: Mainly because you suggested that you had another witness.

Mr. McLean: I am offering him for cross examination.

Mr. McVay: Not for any affirmative proof?

Mr. McLean: No.

By Mr. McVay:

Q: You speak of deferred maintenance. What do you mean by that?

A: Well, I mean the difference between a normal maintenance program that would be adequate to maintain these facilities as they are today, taking into account the expected life of the facilities as compared with the actual maintenance, which I believe to be somewhat low.

Q. Well, you have been going along for years now, and as I understood your testimony, the maintenance has been adequate [fol. 305] quite for safe operation?

A. It is adequate for safe operation, but you will come to a day of reckoning. This line has to be maintained.

Q. Well, is the day of reckoning here now?

A. It is pretty close now on some items, yes.

Q. Your operation is dangerous on this line?

A. I am not talking dangerous.

Q. I am trying to get the distinction between your testimony of adequate or safe operation and then not adequately maintained according to the life of the facilities.

A. That's the definition right there.

Q. Would you venture to say that the operation of that railroad, assuming the same maintenance practiced that you have now in effect, wouldn't be safe for the next ten years?

A. Yes, I think I would venture to say that.

Q. Have you made any study?

A. Certainly. I have made the study to show that there isn't being enough renewals made of ties; there isn't being enough of ballasting done and we are approaching, in some cases, major expenditures on bridges.

Q. Would you say that the maintenance would have to be heavier within the next five years, or could you operate for the next five years on your present maintenance policy?

A. I would say that it ought to be somewhat heavier in the [fol. 306] next five years than it has been.

Exam. Schuttrumpf: I think we better be a little more definite in view of the difference between the \$16,000 and \$23,000 in 1940 and 1941. When you say present, do you mean the 1941 basis or the 1940 basis? They had a big jump in 1941 on the actual expense.

Mr. McVay: I am trying to get at all of this expense.

Exam. Schuttrumpf: You mean on the basis of seven years?

Mr. McVay: I assume that railroads maintain their line always in the best of operating condition. Now, there is a situation where they say that isn't quite true, this road that now is to be abandoned, the maintenance has been deferred.

Exam. Schuttrumpf: I never heard them make that claim that they always kept them in the best condition.

By Mr. McVay:

Q. Is it a fact that you maintain your railroad in the best possible condition?

A. Well, I would make an exception to our so-called thin traffic branch lines.

Q. Well, your rails are maintained just as well and they are just as safe to operate over, are they not?

A. Well, if you are talking about safety, I have to say that we do maintain well enough to assure safety.

Q. That's what I was talking about.

A. Yes, sir.

Q. Yes.

[fol. 307] Have you changed your schedule of operations so far as the running time is concerned on this road?

A. No, sir.

Q. In talking about salvage, you said that somebody, some group, exerted pressure. I think you referred to the government as having exerted pressure. You don't want this record to show that the government, by exerting such pressure, suggested any particular abandonment of service?

A. No, sir.

Q. And particularly not in this case?

A. Well, they didn't suggest this abandonment in the beginning; they asked us to make up a list of possibilities and then they asked us to please pursue them.

Q. And by "they," whom do you refer to?

A. The War Production Board.

Q. They didn't outline any suggestion that a passenger-carrying branch that carries as many as 600 passengers a day should be abandoned?

A. Frankly, I think that the War Production Board considers this a possible abandonment.

~~Mr. McVay:~~ I object to that. He says he thinks. If he knows, all right.

Exam. Schutrumpf: Well, I am sorry you didn't get the answer you like.

Mr. McVay: Will you read the question back, please?

(Question read.)

[fol. 308] Mr. McVay: I think that question can be answered with a yes or no.

Exam. Schutrumpf: Before that, he told you that they hadn't designated any branch line.

Mr. McVay: He then suggested that in some way they hinted at abandoning this line.

The Witness: No.

By Mr. McVay:

Q. You didn't mean to say that?

A. You asked your question in the way that goes back to the time of suggesting various branch line abandonments. In order to answer your question, I have got to answer it on the basis of how the War Production Board—what the War Production Board's position is today. I don't know how I can answer it any other way. Otherwise the record would show a false implication here.

Q. I don't want my questions to be taken so that you will have to give me a false answer or a false suggestion as to what the hint was of the War Production Board.

A. That's why I answered it the way I did.

Q. They haven't outlined any lines to be abandoned, have they, or suggested the abandonment of any lines?

A. I think I have to answer that one this way:

Exam. Schutrumpf: Just if you know.

The Witness: I do know, yes. They asked us, in the beginning, to suggest possibilities for abandonment. They [fol. 309] asked us to pursue the study on those possibilities. As we have gone along with those studies, they have kept in close touch with them. They have a very good idea as to whether or not they think the abandonment ought to be carried out, and I am saying that, based on my negotiations and discussions with them, they are of the opinion that this particular one should be carried out.

Exam. Schutrumpf: Of course, that doesn't change the law, that it is the duty of the Interstate Commerce Commission to decide.

Mr. McLean: What do you mean by "carry it out"? Is that it should be presented to the Interstate Commerce Commission, is that right?

The Witness: That is right.

Mr. McLean: It was the proceedings that were to be carried out rather than the abandonment.

By Mr. McVay:

Q. Have you had any correspondence with regard to that suggestion?

A. Yes, I have.

Q. Have you any correspondence from the War Production Board with respect to this line?

A. I have.

Exam. Schutrumpf: I don't think we need to go into that any more. The Commission has to decide it under the provisions of Section 118 of the Act, and what the War Production Board tell them is between them.

[fol. 310] Mr. McVay: That was brought out on direct.

Exam. Schutrumpf: That is all right.

Mr. McVay: I think that should have been held out, not when I go to examine on it.

Exam. Schutrumpf: Go ahead if you wish to.

Mr. McVay: I will take the suggestion, Mr. Examiner.

By Mr. McVay:

Q. And those are the only bodies that you had any reference to, the War Production Board, and no other commission involved, in making any suggestions as to the need of salvage?

A. Well, we have had some discussions and correspondence with the Office of Defense Transportation.

Q. What is the nature of those communications?

A. Well, they are interested from the standpoint as to whether or not the facility is required. They are primarily interested from the standpoint of whether the facility is required for defense or war purposes, like, for instance, transporting people directly to a defense industry or a cantonment or something of that kind. They are also interested from the standpoint of equipment that might be released for defense or war use.

Q. You have made no study here to determine the nature of the business of the commuters on this line, have you?

A. The nature of the business?

[fol. 311] Q. Yes, whether or not they are engaged directly or indirectly in the war effort.

A. Well, no. I have taken into account the question of ultimate ways that they can travel.

Q. By the way, Mr. McAneny asked you about the curtailment of bus operation. Do you understand that that is to be 15 percent and to be effective on or about December 1st?

A. Not necessarily in this case, no.

Q. Well, not in any particular case, but the general situation is to cut bus transportation by 15 percent beginning December 1st?

A. I don't recall the percentage, but I think that's about it.

Q. Did you make these various alternate trips that you testified about?

A. Yes, I did.

Q. Did you make them in both directions.

A. No, not always; in some cases I did.

Q. Well, that would have a considerable effect on the time occupied to make the trip, wouldn't it?

A. No, I don't think it would.

Q. You think that taking the trip from along the Broadway trolley line to the 242nd Street Subway, up the subway stairs, down to 225th Street, then down the subway stairs—that's a distance of how many feet?

A. I wouldn't recall the feet. It is quite—

[fol. 311a] Q. The construction there is higher than in most places because of the bridge; is that right?

A. Yes, quite a few stairs there.

Q. Then you have to go down quite a few stairs to reach the Central trains?

A. That is right.

Mr. McLean: You are speaking of 225th Street?

Mr. McVay: Yes, Marble Hill.

By Mr. McVay:

Q. Now, in the reverse direction you will concede that commuters, other than the school riders, are people rather along in life?

A. (No answer.)

Q. Take yourself. Wouldn't it take you considerably longer, say, from three to five minutes, to come up the stairs as compared with the time taken in going down the stairs?

A. I wouldn't say three to five minutes, no, as old as I am.

Q. Do you think it would take a longer time on the average in the reverse direction, considering the fact that you do have those steps to climb?

A. Slightly, but my trips were designed to see what the conditions are during these rush hours, and I think the morning rush hour going down is about as stiff a proposi-

tion as you would probably have because you have these other combinations, not only the fare proposition, but you are contending with a schedule both on your trolleys and [fol. 312] subway that's pretty close and more people at that time than other times.

It seems to me that I have been rather fair about that.

Q. I don't question that. I think that—I assumed that you would be fair. However, the railroad will lose the revenue from those passengers that are encouraged to ride in the subway?

A. That is right.

Q. When you spoke of taking the trolley, did you assume that the trolley left at a definite time and that the person leaving his home would go to the corner of Lawrence Street and Broadway and immediately get on a trolley?

A. No, sir; I didn't assume that, but they do run very often at that time of the day.

Q. What is the headway?

A. I believe the headway is about one minute at that time of day.

Q. Isn't it a fact that the figures for the seven months of 1942 on this Getty Square Branch show an increase over the same seven months for 1941?

A. A slight increase, that is right.

Q. Well, the increase is 2.87 percent, and you call that slight?

A. Yes, I call that slight.

Q. The railroad is enjoying about the best business it has in many years at the present time; is that right?

[fol. 312a] A. You mean on the Yonkers Branch?

Q. No. Your railroad.

A. The railroad as a whole?

Q. Yes.

A. We are.

Mr. McVay: That is all I have.

Exam. Schutrumpf: Any further questions?

By Mr. Gray:

Q. In considering your alternative routes and comparing them with the present facilities, did you investigate the route from Lowerre to Sedgwick Avenue, then the shuttle from Sedgwick Avenue to 167th Street, and then down on the Lexington Avenue express to Grand Central Station?

A. Well, I didn't ride that route. I had that listed here as amongst the alternate routes, but I did not put it in this comparison of time and cost.

Q. It would have shown a much quicker method of transportation; would it not?

A. Quicker than what?

Q. Than the ones that you did show.

A. Well—

Mr. McLean: You mean going to Times Square and then back?

Mr. Gray: From Times Square over to Grand Central or walking from 8th Avenue?

The Witness: Well, I won't say, for instance, that it [fol. 313] would be as quick as going over to Ludlow on the bus and then going in on your main line Hudson Division.

By Mr. Gray:

Q. But you have not investigated it?

A. No, I have not.

Q. And you had it there on your list as being a possible present means of transportation?

A. Yes, I did.

Exam. Schntrumpf: Off the record.

(Discussion off the record.)

The Witness: I should change that answer to Mr. Gray and I should say that I wouldn't consider it as quick as the present route from Lowerre via High Bridge and transfer to our Hudson Division into New York.

By Mr. Gray:

Q. You wouldn't consider it as fast?

A. No, sir.

Q. Well, if I told you that I myself take that trip and that the passengers who I see transfer at High Bridge enter the same subway car that I am in at Grand Central, would that cause you to change your opinion?

A. If you said that you did that as a regular thing, it would.

Q. It is a regular thing; it is so numerous that I have lost track of it.

A. I would be willing to change my opinion, if you say that.

Q. Now, during the period that you have had this Yonkers Branch under your operation, have you amortized its [fol. 314] cost from revenues from that line on your books?

Mr. McLean: I object to the question as not being relevant to this proceeding, Mr. Examiner.

Exam. Schutrumpf: I don't know what he means by amortizing the cost. You mean the entire thing, all the equipment?

By Mr. Gray:

Q. Have you charged up from prior earnings your equipment and original cost and cost of maintenance?

Mr. McLean: I object to the question as being improper.

Exam. Schutrumpf: Well, it doesn't have much bearing on it. Do you have depreciation accounts on roadway?

The Witness: Yes.

Exam. Schutrumpf: Or just on the bridges?

The Witness: Yes, I looked into that somewhat because that's a new subject and, before coming here, I checked up what we are getting underway as to roadway accounts. According to the Commission's account, we are going on depreciation accounting for roadway accounts as of January 1st of this year. I can tell you a little bit about what means.

Mr. McLean: It hasn't been done in the past.

Exam. Schutrumpf: You haven't charged any depreciation of roadway and structures in the past, have you? That's what Mr. Gray has asked.

The Witness: No, and it is not in these figures on which we are basing this case.

[fol. 315] By Mr. Gray:

Q. Immediately after the conclusion of the last war, say, in 1919 and 1920, how did the traffic on the Yonkers Branch compare with what it had been prior to the war?

A. I haven't got those figures.

Q. As a matter of fact, isn't it true that during the early years of 1920-odd, that the traffic on the Yonkers Branch was very heavy?

A. I don't know.

Mr. McLean: Your figures go back to 1926?

The Witness: No, 1928.

By Mr. Gray:

Q. And you are not then able to form any opinion as to the possibilities, at the conclusion of the war, of increasing traffic gathered from your past experience?

A. No, I think it would be too speculative on anybody's part to put that in the record.

Q. I am trying to find out what happened at the end of the last war, and that you are unable to answer?

A. Well, I could look it up.

Exam. Schutrumpf: I don't think we need go back to that. Transportation conditions have changed completely.

By Mr. Gray:

Q. This line has been in operation since when?

A. 1888.

Q. Now, when you electrified the branch in 1926, did you do it because you expected increased business, or because the Legislature made you do it?

[fol. 316] Exam. Schutrumpf: Are you in a position to answer that?

The Witness: Only from my study of the files.

Mr. McLean: I object to the question.

Mr. Gray: He said they expected it and now I am asking for the basis of his expectation.

The Witness: I didn't say I expected anything, as I remember.

Mr. Gray: I marked it down here (indicating).

Exam. Schutrumpf: He said he expected that traffic would pick up.

By Mr. Gray:

Q. You expected that you would have increased business?

A. If I said that, I mis-spoke because what I was trying to say was that the public expected that.

Q. You did not?

A. No, sir.

Q. And you were forced to electrify at that time, as a matter of state regulation?

A. We felt under compulsion, about it.

Mr. McLean: You may recall that there was a statute requiring the electrification of certain lines in New York

and it was held unconstitutional, and the same thing might have been held with this litigation but we did not fight it through.

By Mr. Gray:

Q. With respect to the scrap question, which apparently [fol. 317] is the underlying motive for discontinuing this line, is it not true that most of the overhead bridgework is found between the Park Hill Station and the Getty Square station?

A. Just a minute. In the first place, you use the term "overhead," in a different way than we do.

Q. Trestle work?

A. You mean carrying the tracks over the streets?

Q. Yes.

A. Yes. From a tonnage standpoint it provides a little over 500 tons north of Park Hill and a little under 500 tons south of Park Hill.

Q. In order to perhaps meet the wishes of both interested parties, the government and the traveling public, wouldn't it be possible to make Park Hill the terminus, scrap the line north of a switching ground and carry this service on until the conclusion of the war, when the Interstate Commerce Commission would be in a better position to ascertain what the future of the line would be?

A. Well, as far as I can see in that proposition we would not recover a very substantial part of our scrap salvage and second hand rail salvage and we wouldn't get away from these operating laws.

Mr. McLean: Now, how about the cars?

The Witness: That is right. And we wouldn't get the [fol. 318] cars released.

By Mr. Gray:

Q. Do your records show the normal traffic from the Getty Square Station?

A. Well, I have the ticket sales there. Would that do you?

Mr. McLean: Perhaps if you give the percentage of the traffic at each of these stations, it would answer your question.

Mr. Gray: Percentage of traffic using each station?

Mr. McLean: Percentage of revenue derived from the station. Do you have that roughly, Mr. Voorhees?

The Witness: I don't have the revenue divided that way; I do have, for the month of March, 1942, the number of tickets sold at each station, commutation and other.

Mr. McLean: That would be about it, I presume.

Mr. Gray: Not necessarily.

By Mr. Gray:

Q. Are your tickets there allocated, even though they are bought in Grand Central Station, to the station on the Yonkers Branch?

A: They are in my study. Of course, this that I will give you now would just be the sales at the station itself. At Gettys Square, during the month of March, they were 28; commutation tickets sold; at Park Hill, 26; at Lowerre, 126; at Caryl, 114; other tickets were as follows: Gettys Square, 516; Park Hill, 358; Lowerre, 983; Caryl, 1,511.

[fol. 319] Mr. McAneny: May I ask a question there at that point?

Mr. Gray: Surely.

By Mr. McAneny:

Q. How many commutation tickets used along this line were sold at the Grand Central Station ticket office in the periods that correspond with those figures that you gave?

A. Well, see if this would do. I don't have the information that same month of March, but I do have the information for either the three months of 1942 or the six months of 1942. I have the ticket sales from Grand Central Terminal, 125th Street and 138th Street on this sheet here.

By Mr. Gray:

Q. That's for three months?

A. Either three months or six months. I could give both.

Exam. Schutrumpf: Well, give the six months.

The Witness: The six months of 1942, 4,552 tickets.

By Mr. McAneny:

Q. Not commutation tickets?

A. No, that's all tickets.

By Mr. Gray:

Q. Now, commutation tickets—how many were sold during that same period, for stations on the Yonkers Branch?

A. I don't seem to have that here.

By Mr. McAneny:

Q. At any rate, you haven't credited any of that revenue to the Getty Square Branch, have you?

A. Surely, we have.

Q. From the sale of those commutation tickets?

[fol. 320] A. Yes.

Q. At the Grand Central Station?

A. Yes, sir; we have it all in here.

Q. Well, now, how about tickets sold at the Grand Central station to stations in the city of Yonkers? The holders of those tickets are entitled to a transfer?

A. You mean the optional tickets?

Q. Yes.

A. For instance, there is a ticket sold at the Grand Central that is good for Caryl, Lowerre or Lincoln.

Mr. McLean: Exhibit 6, under the right hand column, describes the options in connection with each ticket.

The Witness: Those optional tickets, we credited the revenue to this branch in the proportion that the same type of tickets sold at Caryl and Lowerre on the branch bears to the number of same type of tickets sold at Lincoln. The same way you have a ticket sold at the Grand Central station, which is optional for Getty Square and Dunwoodie, we have done the same thing. We have taken and credited to this branch the revenue from those tickets sold at Grand Central in the proportion that that same type of ticket was sold at Getty Square as compared to the number sold at Dunwoodie.

Q. That's just an estimate?

A. That is right; that's as close as we thought we could get it.

[fol. 321] Q. Well, now, a purchaser of a ticket at Grand Central to the Yonkers station on the Hudson River Division has the right under that ticket to transfer and come up on the Getty Square Branch, hasn't he?

A. Yes, that is right.

Q. And you don't have any figures to indicate what that traffic was?

A. No, sir; we assume that if he bought a ticket to Yonkers, that his intention was mainly to travel to Yonkers.

By Mr. McVay:

Q. Over what branch?

A. Hudson Division. You can't travel to the Yonkers station on the Yonkers branch; the Yonkers station on the Yonkers branch is called Getty Square.

Q. But if I go to buy a ticket, as I did a week or two ago, to get to Getty Square, they gave me a Yonkers ticket, so far as the ticket agent was concerned, although I asked for Getty Square. They have no record that that ticket was for Yonkers on the main line; isn't that true?

A. Well, I would like—

Q. Isn't that true, that the practice is to sell a ticket without questioning whether it is Getty Square or Yonkers on the Hudson Branch?

A. Well, I'd like to have our passenger traffic man answer that question.

[fol. 322] By Mr. McAneny:

Q. You certainly didn't give any credit for that traffic in these figures of yours, did you?

A. As I say, if a man buys a ticket to Yonkers, this study has assumed that he is going to ride to Yonkers.

By Mr. McVay:

Q. If he comes to Getty Square, he rides to Yonkers?

A. Then I can further supplement that in this way: that we had this train count taken which appears on exhibit No. 5, and that indicates that we are not, in the number of passengers that we are dealing with from our ticket sales, cash fare calculation—there's not a great disparity between those and the train count passengers. I don't think we have gone very far astray.

By Mr. McAneny:

Q. Mr. Voorhees, a purchaser of a commutation ticket at Grand Central Station, a commutation ticket to Yonkers, can use that on that Getty Square Branch, can he not?

Mr. McVay: Purchased to go to Yonkers?

The Witness: Well, they might be the tickets that I described, where it would show Lincoln on there, which is on the Putnam main line, or they might have been any optional ticket that was riding on the Yonkers branch, which we counted.

By Mr. Gray:

Q. Were those regular fares or commutation?

A. All kinds of optional tickets.

By Mr. McAneny:

Q. The tickets you were referring to were not tickets which stated on their face that they were optional?

A. That is right.

Q. And of these tickets that I have been referring to, which were tickets between Yonkers and the Grand Central Station?

A. But they do state on them that they are optional. Is that so, Mr. Pierce?

Mr. Pierce: Commutation tickets, too.

By Mr. McAneny:

Q. But you were not referring to those tickets were you?

A. We had a count made of all optional tickets on the train.

Q. You mean that any ticket that might be optional whether it is stated on its face or not?

A. I understand that the tickets that are optional it so states on their face.

[fol. 325] Q. That's what I thought.

A. And those are the ones that were counted.

Q. Those are the ones?

A. I didn't finish saying that on that day, June 17th, westward, there were 38 of those tickets—passengers riding on those tickets as compared to a total number of passengers of 645 in a westward direction. Pardon me a minute; I want to change that 645 to 583 in a westward direction and eastward there were 57 passengers riding on optional tickets as compared to a total number of passengers of 645. I am taking these figures from exhibit No. 5. I think I might add that the optional—that the passengers riding

on optional tickets that we have included in our study of revenues for the year 1941 amounted to 45,200.

By Mr. McArdeny:

Q. Passengers or dollars?

A. Passengers from New York, I should say, because we were talking about assigning those tickets sold at that point to this operation. Naturally, the passengers riding on the tickets sold on the branch are included direct.

Exam. Schutrumpf: We will recess until two o'clock.

(Whereupon, a recess was taken for luncheon until two o'clock.)

[fol. 326]

AFTERNOON SESSION

(Thereupon, the hearing was resumed, pursuant to recess.)

2:00 P. M.

Exam. Schutrumpf: Let the record show that, in accordance with the agreement or consent of all parties, the cross-examination of Mr. Voorhees be deferred to permit certain other witnesses to testify in behalf of the applicant.

Mr. McLean: I will call Mr. Keller.

WILLIAM F. KELLER was sworn and testified as follows:

Direct examination.

By Mr. McLean:

Q. What is your name?

A. William F. Keller.

Q. What is your address?

A. 90 Main Street, Yonkers.

Q. What is your position with the street car company that operates in Yonkers?

A. Superintendent.

Q. Are you familiar with the operations of the line that goes from Getty Square on Broadway down to 242nd Street?

A. I am.

Q. Will you explain what street car lines operate that route, explaining where they commence?

A. Well, we operated—

Q. You can use exhibit 1, which has been introduced in [fol. 327] evidence, if you care to do that.

A. We operate the Warburton Avenue Line which starts at the Hasting City Line.

Q. Beginning with the place marked "Greystone" on the map there?

A. Yes, sir.

Q. And where does that continue?

A. That comes down along Warburton Avenue to Main Street, through Main Street to Getty Square, turns south into South Broadway, and thence along South Broadway and Broadway, New York City, to 242nd Street.

Q. Passing the Park Hall Station and the other points indicated there on the map there?

A. That is right.

Q. Now, is there another line that operates on Broadway as well?

A. Yes, we have the Park Avenue line, which starts at Robertston-Palisades Avenue.

Q. That is the next yellow line below the Warburton Avenue line that you have already described?

A. Yes.

Q. And that continues along on Palisades Avenue and then on Park?

A. Into Getty Square and south from there on South Broadway, Yonkers, and Broadway, New York City, to 242nd Street.

[fol. 327a] Q. Now, we are chiefly interested here, Mr. Keller, in the section from Getty Square to 242nd Street. Will you tell us how often your cars operate in the period in the morning, say between eight and nine o'clock on that section of the road southbound?

A. Well, we provide about a two and a half minute headway with both of those lines.

Q. Then at night, what would be your most crowded condition there, what time, say, between 4:30 and six o'clock?

A. I would say between five and seven.

Q. And what is the headway in which your cars operate northbound on this Broadway Avenue section during that time?

A. About two and a half minutes.

Q. Now, have you made any observation or count of the number of seats available during that period and the number of seats occupied?

A. Well, I have a check here that was taken on September 18th from 6:30 a. m. to —

Mr. Gray: Of this year?

The Witness: Yes.

By Mr. McLean:

Q. What day of the week was that?

A. Friday, September 18th.

Q. Where was that check taken, at what point?

A. Caryl Avenue and South Broadway.

Q. That is just at the city line?

A. Yes, sir.

[fol. 327] Q. What does your check show as to the number of seats as compared with the number of passengers?

A. Well, northbound, Warburton Avenue cars: In that period we provided 6,948 seats and carried 2,236 passengers.

Q. Now, in that period you are referring to what?

A. From 6:30 a. m. to 12 midnight.

Q. That's the whole period?

A. Yes.

Q. Confining your attention chiefly to this rush hour period from five to seven, does your record show there that the —

A. Northbound we provided 1,998 seats and carried 1,320 passengers. That's northbound from five to seven, but that's both lines combined.

Mr. Gurrity: Five to seven a. m. or p. m.?

The Witness: P. M.

By Mr. McLean:

Q. Now, taking it in the other direction, from eight to nine in the morning, what does your record show as to the number of seats provided as compared with the —

A. Well, I broke it down from 6:30 a. m. to 9:30 a. m. in the morning.

Q. What does it show?

A. It shows that we provided 2,808 seats and carried 1,673 passengers.

Q. I think your record also is as to half hour periods as [fol. 328] well, is it not?

A. The record shows half-hour periods throughout the day.

Q. Do you have any particular half-hour period where there is a record of standing passengers?

A. Yes, we have one period from 7:30 to eight o'clock, south bound, when we show seven passengers *standing* as a total.

Q. And an average of how many per car?

A. That would be an average of one per car.

Q. In the event this line of the New York Central was abandoned, which is marked in red on exhibit 1, and increased patronage was diverted to your line, could you provide an increase in the number of cars?

A. Yes, sir, we could.

Q. And would you be willing to do that if the patronage did increase?

A. Certainly.

Q. I think you stated that the count you are speaking of was taken at the Caryl Street line at Broadway.

A. Caryl Avenue.

Mr. McLean: That's all I have.

Exam. Schutrumpf: Cross-examination.

Cross-examination.

By Mr. McVay:

Q. Do you have cars available now that are not being used?

A. Yes, sir.

Q. How many?

[fol. 329] A. We have seven.

Exam. Schutrumpf: What is the seating capacity of a car?

The Witness: 54.

By Mr. Gray:

Q. When you speak of a two and a half minute headway, you mean that there is a Warburton Avenue car every two and a half minutes and a Park Avenue car —

A. No, that would be both lines combined.

Q. Your Warburton Avenue car bears a number, does it not?

A. Yes.

Q. What is that?

A. No. 1.

Q. And the park Avenue?

A. No. 2.

Q. And do they interlock, first a Warburton and then a Park Avenue car?

A. Well, not always; that's because of the difference in the running time.

Q. When was the extension to the subway constructed?

A. You mean from the city line in Yonkers to 242nd Street?

Q. Yes.

A. Long before my time.

Q. Had it already been constructed at the time the Yonkers Branch—that is under discussion—was constructed?

Mr. McLean: I may say the record shows this Yonkers [fol. 330] branch was constructed in 1888. The subway wasn't constructed then, certainly, was it?

The Witness: No.

By Mr. Gray:

Q. Now, you took only one check. That was on the 18th of September, 1942?

A. Well, that was the last check we took on those lines.

Q. When was the next prior check?

A. Well, I don't know—back in August some time.

Q. Of this year?

A. Yes. We took this check—we put a new time table on the line on September 9th so we checked it.

Q. Do you make a check every month of your traffic?

A. No, we make a check when there are complaints made or if the division superintendent feels that there aren't enough cars; or for any other reason of that kind—then we make a check.

Q. Then the usual reason for a check is that there is a complaint that you are not giving adequate service for the traffic?

A. Not always.

Q. Well, usually?

A. No, I wouldn't say that. The Time Table Bureau is under the supervision of the general superintendent, and if he should feel that the superintendent of a division wasn't operating his schedules as he should operate them, why, he [fol. 331] would check it or have it checked.

Q. Well, you operate your line in the most economical way that's possible and give service; do you not?

A. Yes, sir.

Q. And you don't have any more cars in operation than you can and still give the public the service that is required?

A. Well, we try to give the public service, and these checks show that we are operating more cars than is really necessary.

Q. That is, your total seats provided is greater than the total you are carrying?

A. That is right.

Q. Now, about your peak periods.

A. That would prove true, too, because we are allowed by the Commission 50 percent overload. We don't show that any place.

Q. Your overload really amounts to one per car on this check during a half hour period?

A. That is all. I wouldn't call that an overload. I would call that one standee per car.

Q. Now, don't you have difficulty, during the evening rush hours, in providing cars enough to handle the traffic at 242nd Street?

A. No, we don't, except if some unusual condition arises, like a traffic block. For instance, we had a condition in Getty Square this morning where we had an 18 minute delay. A truck broke down on a track. Except for a condition of that kind, we can always provide a sufficient number of cars to carry the passengers.

Q. Are your headway schedules constant throughout the day?

A. Fairly constant. You have to take under consideration traffic conditions.

Q. And your two and a half minute headway applies both during rush hours and during slack?

A. No; the headway varies.

Q. What is your headway during the slack periods of the day?

A. I will give you that in a moment. It is approximately ten minutes on both lines. Warburton, from 6:40 a. m. to 8:35 p. m., it varies, from ten, nine and eight minutes.

Q. Gradually decreasing from 6:40 a. m. to 8:35?

A. Yes.

Q. And then from around noon time to around five o'clock at night it is nine and ten minutes; and then becomes eight minutes?

A. Yes.

Q. Will you please tell me the two limits of the periods where you have a two and a half minute headway with both your No. 1 and No. 2 cars?

A. Well, it would be between 4:30 in the afternoon—between nine o'clock in the morning and 4:30 in the afternoon.

Q. I don't think you understood me. You are speaking of the two and a half minute headway. I want to get the period where that two and a half minute headway is true. [fol. 333] A. The two and a half minute headway would be provided from about seven to nine a. m. and from about 4:30 to seven p. m.

Q. Those are your two peak periods?

A. Yes, sir.

Q. Between those periods, have you any check to show the number of seats you provide and the number of seats occupied?

A. Yes, this check here shows half-hour periods.

Q. Mr. McLean asked you whether there were any periods when there were standing passengers. Have you any periods in those half-hour periods where your capacity is practically running—when you are practically running to capacity on your seating?

A. We have no other period except the period that I mentioned awhile ago where we have standing passengers.

Q. That's from 7:30 to eight o'clock in the morning?

A. Yes.

Q. Do you have a similar period in the evening, after 4:30, northbound?

A. We show none on Warburton; we sh/w none on Park.

Q. During the period from 4:30 to seven p. m., do any of your checks show that you are operating at practically capacity, with very few vacant seats?

A. No.

Q. What is the closest to capacity that your records there show during that period?

[fol. 334] A. Well, I don't think there is any period here where we show running close to capacity.

Q. Isn't there a corresponding period in the evening to the 7:30 to eight o'clock period in the morning?

A. Yes, sir.

Q. Well, what does your northbound traffic show as to that particular period, and when is it?

A. Well northbound on Warburton Avenue—do you want it in half-hour periods?

Q. Yes, please.

A. From 6:30 to seven o'clock we provided 162 seats for 36 passengers; from 7 to 7:30 we provided 216 seats for 112 passengers; from 7:30 to eight o'clock we provided 162 seats for 51 passengers; from eight to 8:30 we provided 162 seats for 90 passengers; from 8:30 to nine o'clock we provided 216 seats for 61 passengers.

Q. That's the Warburton Avenue line?

A. Yes.

Q. How does your Park Avenue line show?

A. Park Avenue, from 6:30 to seven o'clock we provided 216 seats for 62 passengers; from seven o'clock to 7:30 we provided 216 seats for 80 passengers; from 7:30 to eight o'clock we provided 270 seats for 190 passengers; from eight to 8:30 we provided 324 seats for 78 passengers; from 8:30 to nine o'clock we provided 216 seats for 70 passengers.

[fol. 335] Q. Now, then, from the period of 4:30 to 6:30, did you ever have any higher peak than those you have just described?

A. No, sir.

Q. May I see that memorandum you have, please?

A. (Yes). (Handing same to Mr. Gray).

Q. The place where all of these checks were made was at Caryl Avenue?

A. Yes, and Broadway.

Q. On your Warburton Avenue line, then, the peak at this point really runs from six o'clock to seven, does it not?

A. About that, yes. I think you would find that that holds true on Park Avenue also.

Q. I note here on your sheet No. 2 that Park Avenue No. 2 car, destination, 242nd Street, shows, at eight o'clock, 378 seats and 285 passengers. Was that the seven passenger overload?

A. I think it would be, yes, sir.

Exam. Schutrumpf: Any other questions?

By Mr. McVay:

Q. You have been superintendent of the Third Avenue Railway System Lines in Yonkers for how long?

A. 20 years.

Q. Have you enough familiarity to say that the bus system and trolley system of the Third Avenue System in Yonkers is enjoying a lot better business than it has in recent years?

A. Yes.

Q. And you expect it to grow, do you not?

[fol. 336] A. Well, I don't know; I think it may if more automobiles are taken off the street.

Q. Isn't that what you expect, as a transportation man?

A. I think it may.

Q. That fuel and tire restrictions are going to add to the public transportation load?

A. I think it may.

By Mr. Gray:

Q. And you hope so?

A. To what extent, I don't know.

By Mr. McLean:

Q. What has been the percent of your recent increase, comparing this year with last year?

A. At the present time we are about 25 percent ahead of last year.

By Mr. McLean:

Q. This Getty Square branch of the New York Central is a competitor of your street railroad, isn't it?

A. I wouldn't call it that.

Q. Well, it handles passengers at the present time which you say you can handle; isn't that right?

A. That is true.

Q. Well, if you handle those passengers you will be taking them away from a competitive line, won't you?

A. We won't be taking it away from them if they stop running.

Q. Well, the competition will have been removed, will it not?

A. Well, if you want to put it that way.

Q. You are—are you testifying at the request of the New York Central?

A. Our legal department called me up yesterday and asked me to appear over here for Mr. McLean.

Q. And was that the first you knew you were going to testify?

A. That's the first time I know it, yesterday, yes.

Mr. McAneny: That is all I have.

By Mr. Gray:

Q. Now, on your peak load, could you tighten up on your headway appreciably, reduce your two and a half minute headway to a shorter one?

A. I think we could.

Q. What speed do you calculate that your cars make, on the average?

A. Well, at Broadway Park is about eight miles an hour; Broadway Warburton is about nine.

Q. What is the normal speed they make from the sub way, 242nd Street, to Caryl Avenue?

A. I would say about eight miles an hour to Caryl Avenue.

Q. Isn't it true that at Caryl Avenue a considerable number of people transfer to the bus system, to and from?

A. I wouldn't say a considerable number; there are a number of people, but I wouldn't say it was a considerable number. I think, as a matter of fact, that the bus company at Caryl Avenue gets more passengers from the Bronx and Van Cortlandt Park than they do from our Broadway Park or a Broadway Warburton.

[fol. 337] Q. The Bronx and Van Cortlandt Park cars stop at Caryl Avenue and return at the city line?

A. Yes, sir.

Q. Caryl Avenue is just a few blocks north of the New York City Line, is it not?

A. Yes, sir.

Q. How many cars have you in operation on your lines No. 1 and No. 2?

A. Well, we have 18 on No. 2 and 11 on No. 1.

Q. And you have seven in reserve?

A. Yes, sir.

Q. Which are not operating on any line?

A. We run a total of 55 cars and we have 62.

By Mr. McVay:

Q. What is the running time from Getty Square to 242nd Street?

A. 26 minutes.

By Mr. Gray:

Q. What is the distance?

A. A little over two miles.

By Mr. McVay:

Q. That's a ten-cent fare?

A. Yes.

By Mr. Gray:

Q. Your fare limit is at the junction of McLean Avenue and South Broadway?

A. We have an overlapping zone between McLean Avenue and the city line, Caryl Avenue.

Mr. Gray: That is all I have.

[fol. 338] Exam. Schutrumpf: Any further questions?

(No response.)

Exam. Schutrumpf: The witness is excused.

(Witness excused.)

Exam. Schutrumpf: Mr. Voorhees, we will now continue with your cross-examination.

BOYSTON S. VOORHEES resumed and the stand and testified further as follows:

Cross-examination (continued).

By Mr. Gray:

Q. Reverting to those standard coaches which are now running on the Harlem River Division, which you propose to transfer to another line, how long have those coaches been running in that service?

A. Well, I would rather have our operating man answer that.

Q. Can he answer you right now?

Mr. Carkhuft: We have been using on No. 474 standard coaches for a considerable length of time. On No. 450 they have been used more or less since this recent increase in commutation travel.

Q. Can't you give us the years?

Mr. Carkhuft: I wouldn't want to say the years; I can't say definitely.

Q. Well, this considerable time to which you refer, isn't that as much as 15 years?

Mr. Carkhoff: No, I am not sure of that. I have been on the electric division on a tittle over a year, and since I have been there, 474 have been operated with standard coaches [fol. 339] during that period; 450 has not. That has been more or less since we have had that increase in commutation travel.

Q. Is there any record or any person who can state how long standard coaches have been used on train 474? My information is that it is nearly 20 years. I want to check up on that.

A. (No answer.)

Mr. McLean: We will get that for you before the close of the hearing.

Mr. Gray: In the record?

Mr. McLean: That is right.

By Mr. Gray:

Q. Now, in 1916 this Putnam division—the Yonkers Branch ran trains from Getty Square to 155th Street station, did it not?

A. Yes.

Q. And the piers on which this overhead structure operated from Sedgwick Avenue to 155th Street are still there; are they not?

A. Yes, sir.

Q. Is it not true that the girders across the main line tracks of the New York Central at Sedgwick Avenue had remained in place up until this summer?

A. I think they had remained in place until recently.

Q. Weren't those removed just a short time before this petition was filed with the Interstate Commerce Commission?

A. Why, they—that may have been, but it had no relation [fol. 340] to the petition, if that's what you are implying.

Q. As a practical proposition, then, it is possible to continue this present line over to 155th Street, which is directly over the Independent Subway, is it not?

A. Yes, it is.

Q. And if the city of New York would cooperate by placing some means of elevating and taking passengers up and down on an elevator between the platform of the 155th

Street station and the platform level in the Independent Subway, there would be a direct connection with very little physical effort required for passengers to get on at Getty Square and take the Independent Subway downtown?

Mr. Hertzoff: I want to object to that. That's entirely speculative.

Mr. Gray: We are trying to show what the possibilities are.

Mr. Hertzoff: I object to it as speculative.

Exam. Schutrumpf: Well, I think the question shows that it is speculative.

The Witness: May I answer that?

Exam. Schutrumpf: Yes.

The Witness: I don't consider that that is feasible. In the first place, there would be a very considerable expense involved to repair that superstructure on the old foundations. There would be a considerable expense involved to re-
[fol. 341] store that superstructure on the old foundations. Then again, the New York Central equipment—for the city's equipment, due to this third rail interference, you have got to have operation of the bridge based on the New York Central using one track exclusively and the city of New York using the other track exclusively.

By Mr. Gray:

Q. You mean to go across the Harlem River?

A. Yes.

Q. Wouldn't it be entirely feasible to stop the shuttle at Sedgwick Avenue and use both tracks across the Harlem River for the New York Central and permit any person who wanted to shuttle to shuttle over to 167th Street from Sedgwick Avenue?

A. That would mean still more expense in restoring all those connections, the signaling and so on. I don't see how it would pay because all you would be accomplishing would be to substitute a continuous service for a short distance for a service that is now already there and requires a transfer of the passengers. I wouldn't recommend spending the money.

Q. Well, this was one of the alternative routes which I understand you described in your direct testimony?

A. No, sir.

Q. Going over to Sedgwick Avenue—going over to 155th Street and taking the Independent Subway?

A. No, sir, I described that as the present route.

Q. Carrying on the questions which Mr. McAneny asked, [fol. 341a] have you considered the possibility or the practicability of running a two-track interurban, one-car system from Getty Square over to Sedgwick Avenue or over to 155th Street on, say, a ten-cent fare, with practically an express service?

A. I don't believe I quite understand that question. Would you repeat that?

Q. I think Mr. McAneny brought it out somewhat. Supposing a service were to be inaugurated from Getty Square to — supposing a service were to be inaugurated from Getty Square with one-man cars down to Sedgwick Avenue, say, on a ten-cent fare; would that not, in your opinion, draw a lot of trade from the surrounding neighborhood and give a much better service to the people than they are now getting?

A. No, sir; I don't see how that would give them a better service.

Q. I am saying on a 15-minute headway.

A. I don't think that the difficulty of the Yonkers branch service is a question of headway; I think the difficulty is the transfer arrangement. People going to the Grand Central station have to make the transfer at High Bridge. A number of them now prefer to avoid that by taking the bus from this Yonkers branch territory over to Ludlow, and otherwise people that come down to Sedgwick Avenue go over to 155th Street, where there used to be this Ninth Avenue El, which has been cut off, and they have to go [fol. 341b] down to the street level and then go down to the subway level and make the transfer there. I think that those things have more to do with the difficulty in the Yonkers branch service and the tendency for people to avoid it rather than any question of headway.

Q. Isn't it true that the business at Marble Hill has increased under similar conditions to those that you have just described at 155th Street?

A. I don't have any record of what the business is at Marble Hill.

Q. Now, the difference between your service today, when you have 34 trains, is just about half of your service in December of 1926, when you had 71 trains; is it not?

A. That is right.

Q. And when you speak of the 34 and 71, you mean total trains in both directions?

A. Yes, sir.

Q. Now, when you made out these schedules of alternative routes and made an arbitrary allowance of so many minutes for connection, what allowance did you make for the separate connection, for instance, on the one from Lowerre—from Lowerre to Grand Central station?

A. Well, from Lowerre to Grand Central Station via the present route I gave a rate of 9.6 minutes.

That's based on the average time table wait between the Yonkers branch and the Hudson Electric.

[fol. 342] Now, on the bus trip over to Ludlow and then the Hudson Division trains to Grand Central, I have an allowance of five minutes for that connection. As a matter of fact, when I took the trip myself it was not that length of time. In exhibit 7 it shows the buses arriving at Ludlow in the morning. It shows one at 8:02 and it shows one at 8:12. I have occasion to very often take that. I would refer first to the Nodine Hill bus which runs very close to my house.

Q. That's on the second sheet?

A. That is right. You notice there is an arrival there at 8:09 at the Ludlow station. I very often take that bus for the 8:14 train. The morning that I took it, that bus got there at 8:10 and I made the 8:14 train. I observed, many mornings, people getting off the Park Hill bus that's scheduled to arrive at Ludlow at 8:12 and they get the 8:14 train.

Q. How about some other train? Don't you have a longer stretch than five minutes between the bus?

A. Well, you do, but I think an average would be fairly good for five minutes because there are so many times when you don't need five minutes. Coming out the bus almost always stands there upon arrival of the train. You walk right off your train and get right on the bus and go.

Q. But your bus headway is about 12 minutes; is it not?

A. It is 10 and 12. It seems to run around, at least, it seems to run around, at these peak hours, around ten.

[fol. 343] Mr. McKean: Is the schedule adapted to the trains?

The Witness: Yes, it is.

By Mr. Gray:

Q. What is the normal life of the ties that you use on this line.

A. 25 years.

Q. Are they creosoted?

A. Yes.

Q. And you have a date marker on every tie; do you not? Isn't there a spike driven in with the year of its installation?

A. I don't think they are on every tie. Mr. Chamberlain is our maintenance man. They mark certain ties, I think, so that they can keep track of certain ties, but they don't mark every tie.

Q. Is that 25 years the average life?

A. That is right.

Q. Some of them last how long?

A. Oh, I don't believe there would be many ties that would be allowed to stay in tracks much longer than that, maybe a year or two.

Q. What are the oldest ties now in use on the Youkers Division—that are now in use?

A. Well, it may be that our division engineer can answer that. You see, the figures that I made aren't particularly related to those dates because, the way I went at it, it was to take the average life of ties and then figure on the annual restatement of ties to match this 25 year-life. Then I said that in order to make that number of replacements in this [Vol. 344] three-mile section, it would take so many ties at so much cost.

Q. Well, from my own observation, many of the ties that are marked with these dated nails are marked 1925. Do you know whether there was a very heavy replacement during that year?

A. Well, my figures don't go back further than 1933.

Q. In 1941 your maintenance charge for painting bridges was about \$5,000.

A. No, I said it increased about \$5,000 over the average of the 7¹/₂ years that I used.

Q. And that was during the year 1941?

A. That is right.

Q. How often does the necessity for repainting occur?

A. Oh, some 10 or 12 years.

Q. Then your bridges are painted now to keep them going until perhaps 1950?

A. No, because we haven't painted all the bridges in this last year. I was just referring to the painting job that was

done in 1941. There were six bridges that were painted in 1941.

Q. Out of nine?

A. Out of the ten.

Q. And did that include the overhead construction just south of the Getty Square station?

A. That is right, it did.

[fol. 345] Q. When were the remaining four painted last?

A. I don't have that. Have you got that, when those other bridges were painted (turning to Mr. Chamberlain)?

Mr. McLean: That is not available.

By Mr. Gray:

Q. I will waive that. Is it not true, then, that many maintenance charges have been incurred which will not be required to be repeated for another three or four years?

A. I wouldn't say many, no, because, as I pointed out, you picked out one here—but going down through these items, for instance, I have this set up by accounts, I. C. C. accounts. You take roadway maintenance. That has been slighted, I think. That has to do with the ditching and general upkeep of the roadbed. The ties, as I have said, have been slighted. I only have \$648 a year for ties. The rails are behind. That would apply to other track material. That would apply to the item of labor, track laying and surfacing and fences, station and office buildings. I would say this expenditure that I have included is about right what you might have to do from time to time on that. Ballasting, account No. 218, is decidedly behind, so I would say that while there might be one or two items like what you mentioned, there would be others that would more than offset that and I still think that these figures that we are using as our current maintenance expenditures, if anything, are low.

By Mr. McVay:

Q. Now, can you give us the detail of the various in [fol. 346] creases that make up the difference between 1941 and 1942 maintenance expenses?

Exam. Schutrumpf: That's 1940 and 1941.

By Mr. McVay:

O. Yes, 1940 and 1941.

A. I am not using 1941; I am using the average of the 7 1/2 years, which is much less than 1941.

Q. But you point to the Interstate Commerce Commission that you expect to incur much heavier expenses, and I assume that you want them to give that consideration. You tell us that you are under maintaining?

A. Well, I thought I had explained that.

By Mr. Gray:

Q. Now, on this Yonkers branch, how many full crews do you use to operate your present schedule?

A. Well, now, I have here in this set up, as I explained this morning, the amount of crews that would be taken off, the overtime that would be saved.

When it comes to such questions as that, I would prefer to have our operating man answer them.

Q. Can he answer it right now?

Exam. Schutrumpf: Suppose we swear that witness? Mr. Voorhees, you are excused.

(Witness excused.)

J. D. Carkhuff was sworn and testified as follows:

Direct examination.

[fol. 347] By Mr. McLean:

Q. Will you please state your full name?

A. J. D. Carkhuff.

Q. And what is your position with the applicant?

A. Assistant superintendent.

Cross-examination.

By Mr. Gray:

Q. Mr. Carkhuff, how many full crews are now used to operate the Yonkers branch?

A. What do you mean by full crews? I don't just understand that.

Q. I mean a crew that's used full time on the Yonkers branch?

A. There are two conductors, one collector, brakeman and two engineers.

Q. And are there any employees used part time?

A. Yes, sir, there are.

Q. And what employees are they and what time do they spend?

A. They are Putnam Division, enginemen, brakemen and inspector.

Q. That put part of their time on the Yonkers Branch?

A. That is right.

Q. But the discontinuance of the Yonkers branch wouldn't result in their being discharged?

A. No, sir.

Exam. Schutrumpf: Is the time that the Putnam Division men put on the Yonkers Branch overtime?

The Witness: We do run some of these trains—that is, we use some of the Putnam Division trains where there is no [fol. 348] overtime involved, but in many cases it does involve some additional expense on overtime.

Mr. McLean: Off the record a moment.

Exam. Schutrumpf: Off the record.

(Discussion off the record.)

Exam. Schutrumpf: Will you continue, Mr. Gray?

BOYNTON S. VOORHEES resumed and testified further as follows:

Cross-examination (continued).

By Mr. Gray:

Q. Mr. Voorhees, what were the taxes paid to the city of Yonkers by the Yonkers Branch last year?

A. Well, the figure that I have used is designated as 1942 taxes. The city of Yonkers would receive \$23,917.45.

Q. And the difference between that and your total taxes appearing in your questionnaire is what you paid New York City?

A. Except for one small adjustment, taxes paid by lessees of \$676.

Q. And by discontinuing this line you would expect to wipe out this \$23,000 odd item of taxes?

A. I would, yes.

Q. What is the distance between the Caryl station

Mr. McAneny: May I break in for one question?

Mr. Gray: Yes.

By Mr. McAneny:

Q. Well, Mr. Voorhees, if the city of Yonkers was able to substantially reduce those taxes in an effort to continue the [fol. 348a] running of this line, would that have any consideration with you in your desire to abandon it? In other words, that would serve to cut down your expense, would it not?

A. Well, we will assume that they were willing to cut them in half. That would save us about \$11,000 or \$12,000 out of a loss of \$70,000 or \$71,000.

Q. That is according to your figures?

A. Yes, sir, according to my figures. It would have to be more substantial than half, anyway.

Q. You would understand that if you were to abandon this line, the real property would still belong to the railroad company?

A. No, sir; I don't understand so.

Q. Well, it would belong to the party who is paying the taxes, wouldn't it?

A. No, sir, the major part of this property is subject to reversion.

Q. It isn't owned by the railroad?

A. We have it just for railroad use.

Q. It is not owned by the railroad outright?

A. For the most part, it is not.

Mr. Gray: Was it condemned?

The Witness: Yes.

Mr. McVay: Did you make a check of your records to ascertain that?

[fol. 349] The Witness: Yes.

Mr. McVay: What percentage was condemned and what per cent was acquired by purchase?

The Witness: Well, we have a representative from our Land and Tax Department here that can go into that, if you wish.

Mr. McVay: I think it is important and we should have the figures.

By Mr. McAneny:

Q. Just before we go into that, do you know of any effort that the company has made within the last year or so to have those taxes reduced by the city?

A. Yes, sir, I certainly do.

Q. They have filed a protest, have they?

A. Well, I am not so familiar with the protest. This gentleman that's here can tell you about that, but I do know that when we made this study, about three years ago, that we then tried very hard to get the city to make some reduction and we were trying to avoid abandonment at that time through that medium. We weren't successful.

Q. Don't you know that the last time your company made a protest to the city, it was settled between the company and the city, and that since that time there has been no protest on these particular properties?

A. Well, I wouldn't want to agree to that. I would rather have our tax man make a statement about that. You may be [fel. 350] talking about the Yonkers branch and you may be talking about our other property in the city of Yonkers.

Q. Well, they were in the same category and they were all taken off alike by the company—they were all taken up alike by the company with the tax authorities.

A. I know this; that our fellows in the Land and Tax Department do the best they can in the way of protest. We have just had to do it in recent years.

Q. Well, I can also tell you that the last time that the matter came up for settlement, it was agreeably settled between the city and the company, but I would like to ask you if you don't realize that if the railroad were to abandon this line, that the property covered by its right-of-way, although it would be subject to taxation, could still be abandoned by owners who might neglect to pay taxes on it, in which case the city might have to take it over under tax lien proceedings, but I think you can understand that such a course would not be of advantage to the city and I therefore ask that if the city were to take up this question of taxation with your company, with a view of adjusting it so as to relieve it of a considerable part of the tax burden, whether that wouldn't have some bearing on your attitude toward—

Mr. McLean: I think you have already answered that question.

[fel. 351] The Witness: Well, I thought so because I pointed out this heavy loss that we have. I am about as sympathetic as anybody would be with the city taxes, because I am a taxpayer here myself.

By Mr. McAneny:

Q. You can see it wouldn't do the city much good to get this right-of-way property thrown back on its hands. It wouldn't be much of an asset, would it?

A. (No answer.)

By Mr. Gray:

Q. Do your figures for maintenance, in your questionnaire, include any allowance for overhead of your general offices at the Grand Central Station?

A. No, sir, they do not. These are made up on our usual abandonment bases of strictly out-of-pocket and direct expenses, expenses that we believe will actually be saved. There is no overhead whatsoever.

Q. What is the distance along the road from the Caryl Station to the subway at Broadway and Caryl Avenue?

A. You say the Caryl station? You mean first going out Caryl Avenue to Broadway and then south?

Q. No, you go along Caryl Avenue, and there you are when you get to Broadway.

A. Oh, you want to know. I thought you meant 242nd Street?

Q. No. You gave us similar information as to the distance between the Lowerre station and Broadway.

Exam. Schuttrumpf: The distance from Caryl to the street [60, 351a] car line? Is that what you mean?

Mr. Gray: Yes, sir.

The Witness: That is .23 miles.

By Mr. Gray:

Q. Almost a quarter of a mile?

A. Yes, sir.

Mr. Gray: No further questions.

Exam. Schuttrumpf: Any further questions of this witness?

By Mr. McAneny:

Q. Do you think that there has been a real effort on the part of the New York Central during the past few years to synchronize the train schedules of the Getty Square Branch and the Hudson River Line at High Bridge so that they could really cooperate?

A. Yes, I think so.

Q. You think there has been?

A. Yes, sir, I think there has been. As I said, we have 14 different connections there at High Bridge and one at University Heights.

Q. Between trains?

A. Yes; connections between the Yonkers Branch trains and the Hudson electric trains.

Q. 14 a day?

A. Yes.

Q. Well, you mean 14 trains on both branches?

A. Well, maybe I should ask Mr. Carlucci to check me on that.

Mr. McLean: I will put him on later.

The Witness: I could re-figure it from the time table. [fol. 352] Perhaps he has it in his mind.

By Mr. Gray:

Q. Along that same line, will you please look at your records on the 8:09 in the morning out of Park Hill and see what provision is made for a connection at High Bridge.

Mr. McLean: Mr. Carlucci can answer that much more readily, I believe.

Mr. Gray: He can take it from the time table.

Exam. Schuttrumpf: If there are no further questions, his witness will be excused and we will put on Mr. Carlucci.

(Witness excused.)

J. D. Carlucci was recalled and testified further as follows:

Direct examination (continued).

By Mr. McLean:

Q. Some question was raised earlier in the hearing, Mr. Carlucci, about the feasibility of running the trains from the Yonkers branch on to the electric or Hudson division and the trains continuing right on down to Grand Central. Have you considered that possibility?

A. That has been considered. There are many objections to it from an operating standpoint. One is that right

now that we—one is that now, right now, we have no cross-over from the Putnam Division at Signal Station BM to our main tracks.

Q. But even if a cross-over could be put in there, what would be the objection to operating trains over?

[fol. 352a] A. The further objection is that it would be necessary to cross these trains from Getty Square Branch over the other main track at Signal Station BM to reach the eastbound track, which would interfere with our operation and still another objection—

Q. You say interfere with the operation—

A. Yes, of main line trains.

Q. Chiefly in the rush-hour in the morning, are there a considerable number of main line trains operating on the Hudson Division there?

A. There are a number of them, morning trains.

Q. That is through trains from points west: Buffalo, Cleveland and Chicago?

A. That is right.

Q. And also the commuting trains on the Hudson Electric Division from Harmon and that neighborhood? is that right?

A. That is right, including Glenwood.

Q. And you feel that it would be an improper or an undesirable arrangement to cut the Yonkers branch trains into that service?

A. I do, and then when we get down to Mott Haven, we operate in and out of the Grand Central.

Q. Speaking of Mott Haven; that is, the junction between the Harlem Division and the Hudson Division trains at about what street?

[fol. 353] A. 149th Street.

Q. So that there is a converging of the New York Central trains at that point from two divisions, and is there a further converging of trains of the New Haven Railroad at that point?

A. The New Haven trains pass that point and, in addition to what you have mentioned, we must also handle stop trains; that is, with—that is, trains with dead head equipment between Mott Haven and Grand Central Terminal in that territory.

Q. And in the Grand Central territory, along Park Avenue there, after the bridge over the Harlem River is crossed,

there are just four tracks and room for no more; is that right?

A. That is right. At the present time, to take care of the early morning rush, we use three tracks inbound to the Grand Central Terminal and only one track outbound.

Q. About how many trains operate over there in the rush hour period?

A. Our greatest number for any hour is between eight and nine, when we operate about 45 trains.

Q. Between eight and nine o'clock?

A. Yes, sir.

Q. Do you think it would be a feasible operation to attempt to operate more trains over those tracks at that time?

[fol. 354] A. I do not; they are operating in a good many cases on a two minute headway at the present time and it would be impossible to add another train in there.

Q. Because it would interfere with other operations?

A. Interfere and delay.

Q. Now, some question was raised just recently as to the connections at High Bridge. Are you able to state what connections are made with these Yonkers Division trains at High Bridge?

A. Yes, sir.

Q. Could you state the time of arrival at High Bridge of the Yonkers Division trains and the next arrival of a Hudson Division train to make the connection there? I think you worked that out a day or so ago with me.

Mr. Gray: Have you any particular train in mind?

Mr. McLean: If he had it tabulated there, he could give it offhand without having to check each one.

By Mr. McLean:

Q. Do you have it tabulated?

A. Yes, sir; I have it in each case. All trains connect at High Bridge with the exception of one connection that we have at University Heights.

Q. Give us the times of the arrival of the Yonkers Division branch and the arrival of the next Hudson Division train, say, southbound into New York.

A. No. 212 arrives at High Bridge at 7:08 and No. 204, [fol. 355] which is the Electric Division trains, departs at 7:15; No. 216 arrives at High Bridge at 7:34 a. m., and No. 100 leaves High Bridge at 7:44 a. m.

Q. I take it from the numbers that you have assigned, that your 200's are Yonkers Branch trains and your 100's are Hudson Division trains?

A. The 200's are operated on both divisions, if I may say.

Q. Go ahead.

A. No. 218 arrives at High Bridge at 7:49 a. m.

Exam. Schutrumpf: Use the names instead of numbers.

The Witness: The Yonkers train arrives at High Bridge at 7:49 a. m. and the connecting train leaves there at 7:55 a. m. for New York; the Yonkers train arrives at High Bridge at 8:02 a. m. and the New York train leaves High Bridge at 8:06 a. m.; the Yonkers train arrives at University Heights at 8:22 a. m. and the New York train leaves University Heights at 8:27 a. m.; the reason for making that connection at University Heights is that the New York train does not stop at High Bridge. The Yonkers train arrives at High Bridge at 8:57 a. m. and the New York train departs at 9:03 a. m.; the Yonkers train arrives at High Bridge at 9:22 a. m. and the New York train leaves at 9:25 a. m.; the Yonkers train arrives at High Bridge at 9:40 a. m. and the New York train leaves at 9:41 a. m.

Exam. Schutrumpf: How many more do you have?

[fol. 356] The Witness: Quite a number.

Exam. Schutrumpf: I think that is enough.

Mr. McAneny: Have you got a list made out?

Mr. Garrity: I think the rest of them will be interesting because it will show the lack of coordination during the rest of the day between trains and how few trains there are.

Mr. McAneny: I would like to have it on the record, Mr. Examiner.

Exam. Schutrumpf: All right. Go ahead.

The Witness: The Yonkers train arrives at 11:11 a. m. and the New York train leaves at 11:31 a. m.; the Yonkers train arrives at 4:30 p. m. and the New York train leaves at 2:02 p. m.; the Yonkers train arrives at 4:46 p. m. and the New York train leaves at 4:19 p. m.; the Yonkers train arrives at 5:17 p. m. and the New York train leaves at 5:20 p. m.; the Yonkers train arrives at 5:37 p. m. and the New York train leaves at 5:58 p. m.; the Yonkers train arrives at six p. m. and the New York train leaves at 6:23 p. m.; the Yonkers train arrives at 6:18 p. m. and the New York train leaves at 6:23 p. m.; the Yonkers train arrives at 7:05 p. m.,

and there is no real connection for that train. There is nothing to New York until 8:00 p. m.

The same applies with the Yonkers train arriving at High Bridge at 7:24 p. m.; there is no train out of High [fol. 357] Bridge until 8:00 p. m.

Mr. McAneny: These times are all taken from the schedule time tables?

Mr. McLean: As a matter of fact, it all appears in exhibit 3, I believe.

Mr. McAneny: They are all taken from the schedule time table?

Mr. McLean: Yes.

Mr. Garrity: The point that Mr. McAneny made was that the connections are not good connections and he cited these times as the good ones but he isn't citing the trains coming out of New York, where you never make a connection or have a very poor connection.

Mr. McAneny: Are those all stated?

Mr. McLean: Yes, in exhibit 3, which is a Yonkers branch time table. Whatever inferences that can be drawn can be as well drawn from there as the witness.

That is all I have on direct examination.

Exam. Schuttrumpf: Cross examine.

Cross examination.

By Mr. McNay:

Q. As an operating man, what interval would you say should exist on these connections?

A. I would say that the connections are satisfactory because we must, in addition to taking care of the Gerty Square branch, we must take care of the connections at Harmon with trains from the west and it isn't always possible to match them up just as you might desire to do.

Q. Do you consider a train that arrives at 7:05 at High Bridge, in which you have to wait until 8:00 for a connection to go to Grand Central, as being good service?

A. I wouldn't say it is good service, but I would say that for the amount of travel on that train that a better connection isn't necessary.

Q. Would you expect that anybody would ride that train if they wanted to get to Grand Central?

A. With other means available, I would say no.

Q. And isn't that an important consideration in fixing your schedule?

A. Yes, sir; but we have all of these schedules pretty much upon the available travel. You will note that in the morning, where there is any volume of business, we do have what I believe is satisfactory connections.

Q. Actually, what you have done when you set the schedule up this way is to discourage use on that Getty Square branch?

A. I couldn't just agree with you on that because I would have to say that the reason that original connection was probably broken was because there wasn't sufficient business there to justify the connection.

Mr. McLean: You make your schedules with various considerations in mind, connections at both ends and other [vol. 358] matters?

The Witness: That is right.

By Mr. McVay:

Q. Why wouldn't you eliminate such a train as that 7:05?

A. Because we have the equipment and the train crew, and if you would look over our figures on the Getty Square branch, you will probably note quite a few trains that you might think we were justified in operating, but we have 11 MU cars up there and we must arrange to have them at the proper terminal to cover the service where required, and we must also arrange to have the crews there.

Mr. McVay: That is all I have.

By Mr. Gray:

Q. What do you figure it costs per car mile to operate cars on the Yonkers branch?

A. Per car mile?

Q. That is right.

A. Why, I haven't that figure and I wouldn't want to give you that because we must take in electric consumption and train crew, the maintenance and so on.

Q. Can you give us an outside figure?

A. I might give you a figure.

Exam. Schutrumpf: I don't think a guess would be any good.

The Witness: It wouldn't be anything of value because I couldn't substantiate it.

[fol. 359] By Mr. Gray:

Q. Referring to the Yonkers connection which arrives at 8:57 in the morning and the next succeeding train on the main line is 9:03, what is the train immediately preceding the 9:03 train on the main line? When does that arrive at High Bridge?

A. Immediately preceding that is train No. 276 at 8:49 a. m.

Exam. Schutrumpf: What number did you say that was?

The Witness: Train No. 276, due out of Yonkers at 8:41 and out of High Bridge at 8:49.

Mr. Gray: May we go off the record?

Exam. Schutrumpf: Off the record.

(Discussion off the record.)

By Mr. McAneny:

Q. As a matter of fact, you have not made any serious effort to coincide the arrival of the trains northbound from the Grand Central and the northbound trains on the Getty Square Branch, have you?

A. In the evening hours, yes; during the time when there is not a great deal of travel on the Getty Square Branch, we must make connection with the Empire at Harmon, for instance.

Q. As a matter of fact, you haven't done it, though, except for several cars in the evening; is that it?

A. Yes, but I would like to give an explanation to my answer. I believe it's been stated here today that we have greatly reduced the service on the Getty Square branch, which was due to insufficient travel to continue. If there [fol. 360] was a great volume of business there, why, I would be able to give you a different answer.

Exam. Schutrumpf: Is there anything further of this witness?

(No response.)

Exam. Schutrumpf: If there is nothing further, the witness is excused.

(Witness excused.)

Mr. McLean: I will call Mr. Pansky.

JACK H. PANSKY was sworn and testified as follows:

The Witness: Before proceeding, may I state for the record that I am here purely on the fact that my company was served with a subpoena by the New York Central Railroad?

Exam. Schutrumpf: All right.

Direct examination.

By Mr. McLean:

Q. Where do you live?

A. At 1801 Loring Place, New York City.

Q. You are president of the Club Transportation Company?

A. Yes, sir.

Q. That operates the Nodine Hill and Park Hill Bus Lines about which Mr. Voorhees has testified?

A. Yes, sir.

Q. And have you heard his testimony?

A. Yes, I have.

[661, 361] Q. There has been introduced in evidence as exhibit No. 7 a copy of your bus schedules for the Park Hill and Nodine Hill routes. I show you a copy of that exhibit. Is that the proper schedule in effect at the present time?

A. This is a copy of the morning and afternoon rush hour schedules that are presently operated on the Park Hill and the Nodine Hill bus lines.

Q. There has also been introduced in evidence, as exhibit No. 5, a passenger count showing the number of passengers that use the line proposed to be abandoned. I would like you to examine that exhibit, noting particularly the number of passengers on this line that are using trains during the rush hours. Taking the second sheet of that exhibit, you will note a train leaving Yonkers at 7:33 in the morning which has 72 passengers; the one at 7:43 has 122 passengers, and the one at 8:07 has 172 passengers.

Assuming, Mr. Pansky, that those passengers would be approximately equally divided between Caryl and Lowerre stations, would your bus line be able to accommodate those additional passengers?

Mr. McAneny: I would like to ask what you mean by being able to accommodate them. You mean at the increased—you mean if he increased his buses?

By Mr. McLean:

Q. Put it this way: Would it require an increase in the number of buses in order for your line to accommodate [fol. 362] those passengers?

A. Yes, it would require an increase in buses.

Q. Do you have buses available that you could put into that service?

A. We have at present two buses that can be made available for this additional service.

Mr. McVey: Let's get that clear. What do you mean by available? Don't you have reserve buses in addition to reserve equipment?

The Witness: On our other lines in New York City recently we have consolidated some of the lines and reduced others. We can have two additional buses made available for it.

By Mr. McLean:

Q. You have two additional buses that could be used in this service to take care of the increased passengers between the stations and Ludlow?

A. Yes, sir.

Q. And if this business would come to your line, we would use them in that service?

A. Yes, sir.

Q. Considering, then, the night schedule or the patronage during the rush hour at night, would you similarly have buses available at that time which could take care of that increase in patronage to your company?

A. Yes, we could.

Q. Do you have considerable patronage from the area of [fol. 363] Charyl and Bowline that goes through the Ludlow station at the present time?

A. Yes, sir.

Q. And from Park Hill region also?

A. Yes, sir.

Q. So that there are people in this area that do not use the Yonkers branch but use your line to come over to the Hudson Division trains of the New York Central?

A. That is right.

Q. Are your schedules arranged for the most part to meet the New York Central trains at Ludlow and Yonkers?

A. We meet most of the trains during the morning and evening rush hours.

Mr. McLean: That is all I have.

Exam. Schuttrumpf: Cross-examination.

Cross-examination.



By Mr. McAneny:

Q. Mr. Pansky, when you applied for a permit to the City of Yonkers to run this line that you are referring to, didn't you present a lot of evidence from people in that neighborhood to the effect that they were getting such poor service from the New York Central Getty Square Branch that they advocated giving you a permit?

A. Yes, sir.

Q. And that was one of the main points that you brought up, wasn't it?

[fol. 364] A. That was one of the points, yes, sir.

Q. Now, you say that you have two buses available at the present time in addition to those that you are operating?

A. Yes.

Q. Where did you get those buses? Did you purchase them?

A. No, sir.

Q. How did they come into your possession?

A. Well, we had purchased them originally.

Exam. Schuttrumpf: He stated once how he had them on hand, sir.

Mr. McAneny: He said something about a New York company sending them up to him, as I understand.

The Witness: That's the same company.

By Mr. McAneny:

Q. That's not the Club Transportation Company?

A. Yes, it is; the Club Transportation Company owns the equipment.

Q. So that they were disused in New York and sent up to you here?

A. I say they can be made available for this line.

Q. You haven't got them now, have you?

A. The Club Transportation owns them.

Q. But they are not in Yonkers now?

A. No, sir.

Q. So that you don't need those now for any such transportation facilities that you are trying out?

A. Not in Yonkers, no.

Q. What kind of buses are they?

A. They are Mack, 25-passenger buses.

Q. And where are they operated?

A. In the city of New York.

Q. On what lines?

A. On apartment house courtesy bus lines.

Q. Not on regular routes?

A. No, sir.

Q. And have those lines been discontinued?

A. No, they haven't been discontinued, but we were compelled to coordinate and consolidate some of the lines due to the Office of Defense Transportation orders.

Q. You were compelled to do that in order that you shouldn't use these buses?

A. I beg your pardon?

Q. You were compelled to do that in order not to use these two buses; is that right?

A. In order to conserve tires and gasoline.

Q. And in order that these two buses should not be used?

A. That wasn't the directive.

Q. Well, the coordination of the services you were giving were for the purpose of providing for discontinuance of certain other of your equipment?

A. Of certain equipment, yes.

Q. When was this Club Transportation line running to Ludlow Station on the New York Central Hudson River Division—when was that started?

A. December 16, 1937.

Q. And did you operate at a profit in the first year of operation?

A. Yes, sir.

Q. What is the fare that you charged?

A. 5 cents.

Q. You still charge that fare?

A. Yes, sir.

Q. In 1938, did your patronage increase?

A. Yes, sir.

Q. To what extent?

A. I would say about 15 per cent.

Q. Did it increase again in 1939?

A. No, it was constant until about six months ago—seven months ago.

Q. And then to what extent did it increase?

A. It increased another 15 per cent, approximately.

Q. And all of these passengers came out of the area which is now being served by the New York Central Getty Square Branch; did they not?

A. I would say 50 per cent of them are from that area, yes.

Q. This 50 per cent that you speak of came really out of [fol. 367] of what is known as the Park Hill Section of Yonkers?

A. Yes.

Q. Will you describe that section, beginning with South Broadway and going toward the east? What is the layout of the land in that section?

A. It is quite hilly, I would say, and it is mostly residential, private homes.

Q. And from South Broadway up to the Getty Square Branch of the railroad, it is a considerable height, is it not?

A. Yes, it is.

Q. And then from the railroad it is, up to the top of the Park Hill section, another considerable height?

A. Yes, sir.

Q. Now, your bus operates on what streets now that run through Park Hill?

A. From where?

Q. Well, where do you begin north of the City Line?

A. We start at Ludlow Street station and we go in an easterly direction on Radford Street to Park Hill and McLean, and then up Park Hill Avenue to Linden Street; through Linden to Elm Street, and then in a westerly direction toward the Yonkers railroad station at Getty Square.

Q. Well, how much of this is up-grade?

A. I would say three-quarters of the route is mostly up-grade.

Q. Now, you have another route in the Club Transportation System that runs to Caryl Avenue, do you not?

A. Yes, sir.

Q. And when did you start that route?

A. The Caryl Avenue is an extension to our Nodine Hill route. The Nodine Hill route started in 1949, I believe.

Q. The Caryl Street is an extension of the Nodine route?

A. Yes, sir.

Q. When was that started?

A. In September of 1941.

Q. Was it at that time that it was extended to Caryl Avenue?

A. At that time it was extended through the Caryl Avenue section to Ludlow Street station.

Q. In the year 1941?

A. Yes, sir.

Q. Had it—has that route proved profitable?

A. Yes, it is starting to be profitable since the last five or six months.

Q. And that route touches the territory in which the Caryl Street station of the New York Central Lines is situated, does it not?

A. We pass right in front of the station.

Q. And you were probably taking some passengers there that formerly were passengers on the New York Central?

A. Yes, sir.

Mr. McAnerly: That is all I have.

[fol. 369] By Mr. McVay:

Q. Mr. Pansky, how long have you been in the transportation business?

A. About 20 years.

Q. Do you expect to make a profit on each and every operation that you conduct?

A. No, sir.

Q. And you are operating branch lines, are you not, on which you don't make the cost of operation?

A. That is true.

Q. How much has your business increased during the past year?

A. About 16 per cent, I would say, roughly.

Q. And it is still increasing; is it not?

A. Yes.

Q. And you serve a number of railroad stations with your various lines?

A. We serve quite a number of railroad stations, yes.

Q. Have you noted that the business to those bus stations has increased proportionately to the increase on your other service?

A. Yes.

Q. When you applied for certificates of convenience and necessity for your various operations in Westchester County, including Nodine Hill and Caryl Street operations, did the New York Central Railroad ever at any time oppose the applications?

[fol. 370] A. No, sir.

Q. They did not?

A. Not to my knowledge, no.

Mr. McVay: That is all I have.

By Mr. Gray:

Q. If you were called upon by the Office of Defense Transportation to reduce your present service to 45 per cent, how would you do so?

A. Well, we have given that considerable thought and we will probably do that during the nonrush hour periods and the early morning hours, such as six a. m. or 5:30 a. m., when the traffic is very light.

Q. Then you would reduce your service by extending your headway rather than taking any equipment off?

A. Yes, sir.

Q. And that would increase the capacity of your equipment—that is, your equipment would be running more nearly to capacity?

A. Yes, it would.

Q. Now, is it not true that during the rush hour in the evening, you have a very heavy transfer to your Nodine Hill bus, which runs by Caryl Avenue station at South Broadway and Caryl Avenue?

A. Yes, there is a heavy transfer during a period of about 40 minutes in the afternoon rush hour.

Q. That's about six o'clock, is it not?

[fol. 371] A. I would say about 5:30 to 6 or 6:10.

Q. And have you made any check to ascertain whether, during that period, you have a larger number of standees in your bus?

A. We have quite a number of standees during that period in the present buses that are operating.

Q. And during the morning peak on your trips to Ludlow, do you have many standees from the Caryl section?

A. Yes, we have.

Mr. Gray: That is all I have.

Exam. Schutrumpf: Anything further of this witness?

(No response.)

Exam. Schutrumpf: The witness is excused.

(Witness excused.)

Mr. McLean: The applicant rests.

Exam. Schutrumpf: We will recess for about five minutes now.

(Thereupon, a short recess was taken.)

Exam. Schutrumpf: Protestants may proceed.

Mr. Garrity: I will call Mr. McGregor.

ARTHUR J. MCGREGOR was sworn and testified as follows:

Direct examination.

By Mr. Garrity:

Q. What is your full name?

A. Arthur J. McGregor.

[fol. 372] Q. Where do you reside?

A. At 251 Valentine Ave., Yonkers, New York.

Q. What is your official position with the city of Yonkers?

A. Deputy Tax Commissioner.

Q. And as Deputy Tax Commissioner, are you in charge of the Assessor's Office of the city of Yonkers at the present time?

A. I am.

Q. How long have you been connected with the Assessor's Office?

A. Since 1923.

Q. As an Assessor?

A. No, as a clerk up until 1927, and then I was Deputy Assessor, and then from 1927 up to 1941 I was Deputy Assessor and from there on I was Deputy Commissioner of Assessment and Taxation.

Q. And the Commissioner of Assessment is now absent?

A. He is in the Navy.

Q. And for the duration of the war, then, you are the Assessor of the City of Yonkers?

A. That is right.

Q. Is it your duty—is it under your control and jurisdiction as to the assessment of all properties within the City of Yonkers?

A. Is is.

Q. Now, Mr. McGregor, I show you an exhibit that is bound, and ask you whether or not the first page of that [fol. 373] exhibit is a section of the tax map of the city of Yonkers?

A. It is.

Q. And what else is contained in that exhibit?

A. Well; it shows a blue pencil line here representing the Getty Square Branch of the New York Central; it shows a red line on either side of this blue line representing an area surrounding the New York Central Line; that is, the Getty Square branch.

Q. And the subsequent pages of the exhibit, what do they show?

A. They show red lines, indicating the area surrounding this Getty Square Branch of the New York Central Railroad.

Exam. Schutrumpf: Is that the detail of the first page? Is that the idea?

The Witness: Yes, it is; it is a follow-up. It is broken down into different sections.

By Mr. Garrity:

Q. Was this prepared under your direction and supervision?

A. Yes, it was.

Exam. Schutrumpf: What is the purpose of the exhibit?

By Mr. Garrity:

Q. What does this exhibit show?

A. This exhibit was made to show the areas that were affected by the New York Central Railroad as far as commuting and passengers are concerned.

Exam. Schutrumpf: In other words, the first page of [fol. 374] that exhibit—the red line indicates what you consider the area tributary to this branch?

The Witness: Yes, I do. For instance, there is other property that's affected here, which represents about 121, 932 acres that we feel is affected by this railroad.

Exam. Schutrumpf: Well, I wonder if we need——

Mr. McLean: I object to the introduction, if that will bring the question to a head, because it pertains to a matter which is not relevant to this proceeding.

Exam. Schutrumpf: I have to overrule that objection. He has put in the area that he considers tributary to the railroad. I construe that to mean that the people who live in that area would use this line.

Mr. McLean: Being a tax assessor, I presume that he is going to go further and state that the value of their property will be affected and if it is introduced for that purpose——

Mr. Garrity: We haven't asked that question yet.

Mr. McLean: If it is introduced for that purpose, I object to it.

Exam. Schutrumpf: Well, I don't believe that we should bother with the detail in back of that area. I think the first page would be sufficient for our purposes.

Mr. Garrity: Is that the only thing that will be accepted?

Exam. Schutrumpf: The first page will be accepted.
[fol. 375] I will rule that we will receive the first page, which will be received in evidence as exhibit No. H-8, with the understanding that copies will be given to the other side, of course.

(Exhibit H-8, Witness McGregor, received in evidence.)

By Mr. McAneny:

Q. You prepared this complete exhibit, did you not, Mr. McGregor?

A. I did.

Q. And it consists of a certain number of typewritten pages, does it not?

A. There's a supplementary sheet with those typewritten pages. It is not attached to it.

Q. Now, what do those typewritten sheets purport to show?

A. They show the assessed value of selected areas on this page. It shows the assessed valuation of railroad property from 1939 to 1943, unit value applied to the railroad right-of-way, area of the railroad property, population, data of the city of Yonkers, detailed sheets in support of the value of selected area.

Q. Where you say that they show assessed valuations other than assessed valuations of the railroad's property,

in your opinion are the properties for which the assessed valuations are given within the area the valuation of which is affected by the existence of this railroad?

Mr. McLean: I object to the question as being not relevant [fol. 376] to this proceeding.

Exam. Schutrumpf: Objection sustained.

Mr. McAneny: I take an exception. I can ask him what it is.

By Mr. McAneny:

Q. Will you further describe what this exhibit is?

Mr. McAneny: Do you exclude it as to everything that he has mentioned?

Exam. Schutrumpf: I have accepted the filing of the first page of the map, which shows the area tributary and, merely for the purpose of expediting. I will rule that he can give the totals on each one of these six subjects that he has mentioned and not the detail of them.

Mr. McAneny: Then we will have it marked for identification otherwise?

Exam. Schutrumpf: I will just ask him to read the figures for each of the six classifications that he has stated and not accept the typewritten statements.

By Mr. McAneny:

Q. Will you give those figures?

A. Yes, I will. The assessed valuation of the selected area—

Exam. Schutrumpf: Being the area marked in red on exhibit II-8?

The Witness: Yes.

Mr. Garrity: What I wanted first to do with Mr. Mc[fol. 377] Gregor was, as the assessor of the city of Yonkers, to describe the areas that the railroad have been referring to. They have referred to Caryl Avenue Station; they have referred to a Park Hill Section; they have referred to a Lowerre section. There is no testimony as yet in the record as to the density of population of the areas served. They haven't put in any figures, and what I first wanted to show with Mr. McGregor was the physical condition of the section.

Exam. Schutrumpf: Off the record a moment.

(Discussion off the record.)

By Mr. Garrity:

Q. Mr. McGregor, as an assessor of the City of Yonkers, are you familiar with the area through which the Getty Square line of the Putnam Division runs?

A. Yes, I am.

Q. Will you tell the Commission what the nature of the buildings are in the Caryl Avenue section?

A. In the Caryl Avenue section, particularly Caryl Avenue running from Broadway over to Van Cortlandt Park Avenue, that's heavily populated and there are many apartments located there. Practically the south side of Caryl Avenue from Van Cortlandt Park Avenue to Broadway is just one continuous line of apartments.

Mr. Gray: Apartment houses?

The Witness: That is right.

Then, north of that—

[fol. 378] By Mr. Garrity:

Q. Just a moment. Referring to exhibit No. 118, will you, by sections, designate the section that you are talking about?

A. This would be from this red line here (indicating)—

Exam. Schuttrumpf: You better mark it better than that.

By Mr. Garrity:

Q. Section 29—is that the apartment-section that you are speaking of?

A. Section 11, which is the particular section that we are talking about, but which represents the sheet on our map.

Q. Now, section 11 that you have referred to, you say, is constructed with apartment houses?

A. That is right.

Q. Can you give the Commission any idea of the size of the apartment houses in that particular section?

A. Yes, these apartments, most of them, in fact, are elevator apartments. Some are walk-ups, and the number of families housed in these apartments average, I would say, from 20 to in the neighborhood of 90 families.

Q. And in the vicinity of the Caryl Station, in section 11, is that entirely covered by apartment houses?

A. The south side of the street is, outside of one or possibly two one-family houses. On the north side of

Caryl Avenue, in section 11, running between Broadway and Van Cortlandt Park Avenue, there are apartments comparable to the ones on the south side, and then again [fol. 378a] there's one-family houses and two-family houses.

In going deeper back from that street, into Saratoga Avenue and Elinore Place and Wellesley Avenue, there are one-family houses and apartments again and two and three-family houses. This area in here that we have just spoken of is quite heavily populated. There is very little vacant ground there.

Going up from Van Cortlandt Park Avenue over to as far as McLean—

Q. You are now describing the area east of the railroad tracks?

A. Yes, east of the railroad, still on page 11 here and part of 18; there again we run into apartments that house 50 and 60 families and again one and two and three-family houses.

Q. To your knowledge, are most of the people that reside in that section of the town commuters to New York City?

A. Well, I would say that the major part of them are commuters to New York City.

Mr. McLean: You mean the head of the family?

The Witness: The head of the family and people working—their sons and daughters.

By Mr. Garrity:

Q. Will you describe the area around Lowerre station?

A. Well, Lowerre station is, I will say—that is, the apartments are about the same nature. There are not as many of them right around the Lowerre section. There are more [fol. 378b] one, two, and three and four-family houses and that, too, is heavily populated and there are in there about three or four apartments that would house somewhere between 50 and 75 families.

Exam. Schutrumpf: May I interrupt you there? Have you made any estimate of the area as to the population, the total?

The Witness: Only into wards. I have it broken down into wards that are affected and I took it that way.

By Mr. Garrity:

Q. This section that you have described to the Commission, taking in the area around the Caryl station and the Lowerre station, take in what wards of the city?

A. It takes in the Eighth Ward.

Q. And have you a population tabulation of the Eighth Ward?

A. In 1940 there was 11,951 people living there, according to a study made by the City Planning Board on May 16, 1941.

Q. Now, north of the Lowerre station there is a section known as Park Hill, is there not?

A. There is.

Q. Is that included in your exhibit No. H-8, within the red lines?

A. Yes, sir.

Q. Will you describe to the Commission what Park Hill consists of?

A. Well, Park Hill is one of our highest residential sections in the city. It is built up with one-family houses of a [fol. 379] value, I would say, running between \$13,000, \$15,000, \$16,000 and sometimes \$20,000, and it is pretty well built up and it is a very, very nice section, and this railroad here gives them service there.

Q. And what ward of the city is Park Hill in?

A. It is in the Eighth and Seventh Wards.

Q. Now, have you the population figures for the Seventh Ward of the City of Yonkers?

A. The Seventh Ward—it was 10,014 people the same year, the same date.

Q. Now, coming back into the Getty Square area, have you included that in your exhibit?

A. Yes, we have, between Broadway and School Street. That, of course, is heavy populated.

Q. That's the densest part of the population of the City of Yonkers, is it not?

A. That is not—not for the area that is included here. I would say that the Eighth Ward is more densely populated in this area than the area that I have used for the Getty Square branch of the line.

Q. Now, the Getty Square branch of the line is included in what wards?

A. That's in the Fourth Ward and the Seventh.

Q. And have you the population figures for the Fourth Ward?

A. The Fourth Ward is 16,239 people; the Seventh Ward, [fol. 389] as I said before, is 10,014.

Exam. Schutrumpf: What is the Sixteenth Ward?

The Witness: Fourth Ward?

Exam. Schutrumpf: What figures are these last figures?

The Witness: This is the face map, you see.

By Mr. Garrity:

Q. So that the total population figures that might be included in this area would include the Seventh, Eighth and Ninth Wards?

A. That is right.

Q. Have you also tabulated the assessed value of this selected area within the red lines on exhibit No. II-8?

A. Yes, I have.

Q. And have you that figure?

A. Yes, I have.

Mr. McLean: I object to the assessed valuation figure being shown.

Exam. Schutrumpf: The witness may answer.

A. The assessed valuation of that area is \$27,901,250.

By Mr. Garrity:

Q. That includes both land and improvements?

A. That is right.

Q. And have you a detail sheet supporting this valuation?

A. Yes.

Exam. Schutrumpf: I don't want the details.

By Mr. Garrity:

Q. At the same time did you, at my request, tabulate the assessed valuation of the New York Central Railroad [fol. 381] property in this area?

A. Yes.

Q. Have you the valuation for the year 1943?

A. I have.

Q. And in that figure, is there a valuation for the land values?

Mr. McLean: Are you speaking now just of the Yonkers Branch?

Mr. Garrity: That is right.

The Witness: There's a total there. There is the land and improvements with a total.

By Mr. Garrity:

Q. What is the total valuation of the property on the Gatty Square Branch?

A. The total real estate value is \$512,000.

Q. Is there a special franchise tax added to that, taxable by the City of Yonkers?

A. Yes, but not included in that. The special franchise tax is \$75,050, making a total of \$587,050 assessment.

Q. For the year 1943?

A. That is right.

Mr. McLean: Is that an increase over 1942?

By Mr. Garrity:

Q. Have you the figures for 1942?

A. Yes, I have.

Mr. McLean: What is the increase?

The Witness: The total for 1942 is \$590,410.

[fol. 382] Exam. Schutrumpf: In 1943 the \$512,000—will you break that down between land and improvements?

The Witness: The land is \$363,500; \$148,500 for improvements, making a total of \$512,000.

By Mr. Garrity:

Q. Have you a same set of figures for the year 1942?

A. I have.

Q. What is the total assessed valuation?

A. The total assessed valuation, including special franchise, is \$590,410.

Q. What is the land value?

A. The land value is \$377,950.

Q. And the total of the improvements?

A. The improvements is \$139,500.

Q. And the special franchise tax?

A. \$72,960.

Mr. Gray: That's an assessment, is it not?

The Witness: Yes, assessment.

By Mr. Garrity:

Q. Have you the figures for 1941?

A. I have.

Q. What is the total tax?

A. The total tax assessed is \$517,950; the land is \$377,950, improvements, \$140,000; the special franchise assessment is \$66,595, making a total of \$584,545.

Exam. Schutrumpf: This special franchise is applicable [fol. 383] solely to the three miles that's to be abandoned?

The Witness: That is right.

Mr. Gray: Less than that.

By Mr. Garrity:

Q. Have you it for the year 1940?

A. Yes, I have.

Q. Will you give me that?

A. The total there is \$517,950, land being \$377,950, improvements, \$140,000, franchise assessment, \$73,720, making a total of \$591,670.

Q. Have you it for the year 1939?

A. Yes, I have.

Q. Will you give me the figures?

A. The total is \$558,650, the land being \$378,150, the improvements being \$180,500, the special franchise assessment, \$87,570, making a total of \$646,220.

Mr. Garrity: I understand that the Commission doesn't want any testimony on the detailed assessed valuation of the area?

Exam. Schutrumpf: That is correct; I don't think we need go into that.

Mr. Garrity: That is all I have.

Exam. Schutrumpf: Any further questions?

By Mr. Gray:

Q. Will you please describe more fully, Mr. McGregor, what you term the special franchise assessment?

A. The special franchise assessment is the assessment [fol. 384] that is returned to us from Albany, and what they return we use as the assessment that they place against the Getty Square branch of the New York Central Line, taking it that included in that is the right to use the road, and there are two bridges included in that special franchise.

Q. When you mean to use the road, you mean the northern part above Park Hill?

A. That is right.

Mr. Gray: That is all I have.

Cross-examination.

By Mr. McLean:

Q. Do you think the Fourth Ward is naturally tributary to this line?

A. Yes.

Q. Isn't it closer to the Ludlow station, or a good part of it?

A. I didn't mark out—here, if you will notice that this is where I have included, in this exhibit here.

Q. Is it—it is all west of Broadway, isn't it?

A. No, this is the only part of it I have used, you see.

Mr. McLean: No further questions.

Exam. Schutrumpf: If there is nothing further, the witness is excluded.

(Witness excused.)

JOSEPH TOUSSAINT was sworn and testified as follows:

[fol. 385] Direct examination.

By Mr. Gray:

Q. What is your full name and address?

A. Joseph Toussaint, 118 Saratoga Avenue, Yonkers, New York.

Q. Do you use the Yonkers branch of the Putnam Division to commute to your business?

A. I do.

Q. Where is your business?

A. At 80 Broad Street, New York.

Q. What train do you usually take in the morning?

A. The 7:39.

Q. From what station?

A. Caryl.

Q. And what is your experience in the time required to reach your office taking that means of transportation and transferring at High Bridge?

A. I don't transfer at High Bridge.

Q. How do you get down?

A. I go to Sedgwick Avenue, go across the bridge and take the Eighth Avenue Local.

Q. That's on the Independent Subway System?

A. That is right, the Eighth Avenue local train. I go down to Chambers Street and then walk down to my office. The actual running time is one hour and ten minutes.

Q. Now, do you ever cover that—that is, do you ever go from your home to your office, or in in the opposite direction by some other means of transportation?

A. Well, I frequently use the I. R. T. coming up to Woodlawn and then take a No. 4 trolley.

Q. And what do you find to be—is there any difference in the running time?

A. At least 15 minutes if you make good connections with the trolley.

Q. And that's a minimum?

A. Yes, sir.

Q. What do you find is the maximum that occurs with reasonable frequency, if any?

A. One hour and 25 minutes.

Exam. Schutrumpf: That's on the return trip?

The Witness: Yes.

Exam. Schutrumpf: Well, have you had him come back from where he goes?

By Mr. Gray:

Q. When you return, do you reverse the route that you have just described on the Putnam Division?

A. I do.

Q. And what do you find your running time to be on your return by using that route?

A. It is a little bit longer, usually an hour and 15 minutes.

Q. Do you remember whether you have taken this substitute route in going in a southbound direction?

A. No, sir, a good commuter never misses his train.

[fol. 387] Q. How long have you been commuting on this road?

A. On this road, 18 years. I commuted on the main line 12 years previous to that.

Q. How long have you been living at your present residence?

A. Two years.

Q. And prior to that, in what area did you live?

A. The same area.

Q. Are you in favor of discontinuing the Yonkers branch of the Putnam Division?

A. Absolutely not; I don't favor that subway ride downtown.

Q. Do you take the subway occasionally?

A. Very seldom.

Q. Why not?

A. Because I dislike it.

Q. What is your reason for the dislike?

A. Well, it is a longer trip and more tedious.

Q. How old are you?

A. 62.

Q. When you use the subway, have you used it in going to your office from your home?

A. Very seldom, Mr. Gray, very seldom.

Q. Can you give us an approximation of the time that it has taken you to go from your home to your office while using the subway?

A. I would say one hour and 25 minutes.

[fol. 388] Q. And what method do you follow when you take that route? What route did you follow?

A. I walked over to Caryl Avenue and Broadway, took the trolley down to 242nd Street and then took the 7th Avenue subway direct to Wall Street.

Mr. Gray: You may examine him.

Cross-examination.

By Mr. McLean:

Q. The time you have given us is the time it takes from your house to work in the lower end of Manhattan; is that right?

A. Right.

Q. It takes you approximately—it would take you approximately 15 minutes more going down and ten minutes more time coming back?

A. Approximately yes.

Mr. McLean: That is all.

Redirect examination.

By Mr. Gray:

Q. And, of course, the inconvenience and the disagreeable experience of riding in the subway, the City Subway?

A. Yes, sir.

Br. Mr. Hertzoff:

Q: Do I understand that you do not take the subway from 167th Street?

A. No.

Q. I thought you said you got the 7:39 train, you go to [fol. 389] Sedgwick Avenue, across the bridge, and down on 8th Avenue?

A. That is right.

Q. That's the subway at what street?

A. That's 155th Street, that isn't like taking a long trip on the subway from 242nd Street down.

Q. You are only a local commuter; you just commute down to the subway. You don't go to Grand Central?

A. No.

Q. On the way back, do you get on at Sedgwick Avenue, too? Do you go over the Independent Subway to Sedgwick Avenue and then take the train from there to Caryl?

A. Right.

Recross-examination.

By Mr. McLean:

Q. So the difference is that you would have to get on the subway at 225th Street instead of 155th Street?

A. 242nd Street.

Q. You would get on at 242nd Street and now you get on at 155th Street.

A. There is quite a difference.

Q. I am not suggesting there isn't for a moment.

A. If you ever rode on that Seventh Avenue, you would realize they stop at every station and they are not express until they get to 96th Street, so you have got all those local stations to stop at.

Mr. McLean: That is all.

[fol. 390] Exam. Schutrumpf: The witness . . . excused.

(Witness excused.)

ELSIE BRUSIE was sworn and testified as follows:

Direct examination.

By Mr. Gray:

Q. What is your full name and address?

A. Mrs. Elsie Brusie, No. 9 Wendover Road, Yonkers, New York.

Q. Are you a commuter on the Yonkers Branch of the Putnam Division?

A. A daily commuter.

Q. And how long have you been such a commuter?

A. For 18 years.

Q. Where is your employment?

A. Sedgwick Avenue and 161st Street.

Q. With what concern are you connected?

A. The H. W. Wilson Company, publishers.

Q. What is your running time from your home under the present method of commuting—from your home to your office?

A. About 25 minutes.

Q. And where do you board the Putnam Division?

A. At Lowerre station.

Q. What train do you usually take?

A. The 8:11 in the morning.

Q. Have you ever made a trip from your home to your office by any other method of transportation?

A. Yes, a very inconvenient way, by taking the McLean [fol. 391] Avenue trolley down to Woodlawn Station of the Lexington Avenue subway and then transferring from 167th Street across the shuttle to Sedgwick Avenue.

Q. Have you compared the running time with this method on which you just spoke?

A. Indeed, I have. I have had occasion to.

Q. What is the difference, if any?

A. At least 30 minutes. It depends on how long I have to wait for a trolley—sometimes five, ten, fifteen, and I have waited twenty minutes.

Q. For what trolley?

A. The McLean Avenue trolley.

Q. So that the record may be clear, do you mean that this was 30 minutes more by the substitute over what it takes you to go down by the Putnam Division?

A. Between 35 and 45 minutes.

Q. And you make how many transfers during that trip?

A. Two: one at Woodlawn and one at 167th Street to take the shuttle.

Q. Are there any other employees in this H. W. Wilson Company who are similarly situated?

A. Yes, there are.

Q. How many?

A. About 20.

Q. Who reside in Yonkers?

A. Yes, some go from Getty Square, some from Park [fol. 392] Hill Station and some from Lowerre station.

Q. Have you been requested by them to represent them here at this hearing?

A. I have.

Q. And have you the names of those persons?

A. They are all signatures that I have submitted to you.

Q. If the Yonkers Branch of the Putnam Division were to be discontinued, would you have any more direct method of reaching your place of business than the one you described?

A. Yes, it would be possible to go down to Lincoln station on the main line railroad.

Q. Have you ever taken that route?

A. I came up once, but I made no comparison of the time.

Q. How is the train service on the branch at the Lincoln station?

A. The train service is good. It is the trolley service that would make it very bad in cold weather.

Q. You would have to take the trolley to the Lincoln station?

A. Yes, and, in fact, all of those for whom I have submitted the signatures would do the same; it would be necessary for them to depend on that trolley as well as the main line trains.

Q. And the headway on that trolley, according to your experience, is as much as 20 minutes?

A. I have waited that long. If any one has had that experience down at Woodlawn on a cold winter's night, they will know it is some experience.

Q. That is, coming northbound?

A. That is right.

Mr. Gray: You may inquire.

Cross-examination.

By Mr. McLean:

Q. Your most feasible method of getting to your place of employment, if this branch is discontinued, would be to take the McLean Avenue car over to the Lincoln station of the Putnam main line and come down that way?

A. Yes, which would entail an additional expense as well.

Q. And that would be the extent of the trolley fare?

A. That is right.

Q. Which is five cents a day each way, I believe?

A. Yes.

Exam. Schutrumpf: How long does it take the trolley from Lowerre to Lincoln?

The Witness: Between five and ten minutes. That is running time, without waiting for it.

Exam. Schutrumpf: Any further questions of this witness?

(No response.)

Exam. Schutrumpf: The witness is excused.

(Witness excused.)

WILLIAM G. MENAUCH was sworn and testified as follows:

[fol. 394] Direct examination.

By Mr. Gray:

Q. What is your full name, please?

A. William G. Menauch.

Q. Where do you reside?

A. At 550 Van Cortlandt Park Avenue.

Q. Yonkers?

A. That is right.

Q. Have you been a commuter on the Putnam Division—on the Yonkers Branch of the Putnam Division?

A. Yes, since 1929, up to the time I retired in 1940.

Q. Are you now an officer of the South Yonkers Residents' Association?

A. I am.

Q. What is your office?

A. Vice President.

Q. Has your association taken any formal action upon the proposed discontinuance of this line?

A. Yes, we have.

Q. Have they adopted a resolution?

A. Well, they presented a set of resolutions, yes, rather informally and we didn't cover any—we didn't cover all the points.

Q. You covered some points?

A. Yes.

Q. Have you that resolution here?

[fol. 395] A. I have it in my pocket.

Q. Would you prefer to have it read into the record or offered, Mr. Examiner?

Mr. McLean: I object to having it read into the record.

Exam. Schutrumpf: I suppose the import of the resolution is that they are against it?

Mr. Gray: The import of the resolution is that they are against the proposed discontinuance.

The Witness: Decidedly so.

Mr. McLean: Does it contain an offer to bear the deficit arising out of the operation?

By Mr. Gray:

Q. How many members in your association?

A. Approximately 200.

Q. And are many of them commuters and property owners?

A. Most of them are, and all of them are property owners. Nobody can join the association unless he is a property owner.

Q. And what proportion are commuters?

A. Well, as to that I couldn't say.

Exam. Schutrumpf: Well, we have the passenger count.

Mr. Gray: Those are all the witnesses I have to offer now.

The Witness: I would like to say here, as a prospective victim in that section—I would like to enlighten the Commission and you gentlemen as to the factors that I took [fol. 396] into consideration when I bought my house, which is on Van Cortlandt Park Avenue, about six minutes' walk from the Lowerre station. I took into account the tax rate, of course; I took into account its proximity to churches and, more particularly, because my daughter was going to college at the time and that I was going to business in the city of New York, I took into account and very strongly the transportation facilities.

I also figured that the price that I paid for the land and the house was a reflection in the price of the convenient facilities, the railroad facilities, that would be at my dis-

posal when I purchased the property. I would not have purchased the property in the section of Yonkers that I did if the New York Central Putnam Division hadn't been in its present location.

Exam. Schutrumpf: I suppose you mean Yonkers Branch?

The Witness: That is correct, the Putnam Branch.

Mr. McAneny: The Getty Square Branch?

The Witness: That is right.

Exam. Schutrumpf: How far are you from Lincoln?

The Witness: Well, quite some distance there. If I took the McLean Avenue car, do you mean?

Exam. Schutrumpf: Well, the easiest way to get there.

The Witness: Well, the schedule followed by the McLean Avenue car, I presume I would probably make it as quickly [fol. 397] by walking it.

Exam. Schutrumpf: Well, how far would you have to walk from your home to the Lincoln station?

The Witness: I never measured the distance, but I should say about two miles.

Exam. Schutrumpf: I just wanted to get some idea of that.

Mr. Garrity: Will you further describe to the Commission whether or not you would have to go up a hill and then down the side of another hill to get to the Lincoln station from your home?

The Witness: I would.

Exam. Schutrumpf: If there is nothing further, you are excused.

(Witness excused.)

PATRICK CHRISTOPHER was sworn and testified as follows:

Direct examination.

By Mr. Garrity:

Q. What is your name?

A. Patrick Christopher.

Q. What is your address?

A. No. 15 Amackassin Terrace, Yonkers, New York.

Q. Are you in the real estate business in the city of Yonkers?

A. Yes, sir.

Q. A licensed real estate broker?

[fol. 398] A. Yes, sir.

Q. And how long have you been engaged in that business?

A. About 30 years.

Q. Now, in connection with the real estate business, have you testified in other proceedings involving the value of real estate in the city of Yonkers?

A. I have.

Q. Are you familiar with the values of real estate in South Yonkers, in the Lowerre section?

A. I am.

Q. Caryl Avenue section and in Park Hill section?

A. Yes, sir.

Q. What proceedings have you testified in, Mr. Christopher?

A. I have testified in a great many proceedings, some of the more recent ones being in 1942.

Mr. McLean: We will concede the gentleman's qualifications as a real-estate expert, if that will shorten the matter.

By Mr. Garrity:

Q. Mr. Christopher, I show you exhibit No. 88 and ask you whether or not you have seen that exhibit before, showing the red line and the marked area surrounding the Getty Square line of the Putnam Division.

A. Yes.

Q. And are you familiar with the territory within the red lines on that exhibit?

[fol. 399] Q. Now, Mr. McGregor, who preceded you in the hearing, testified that within that area there was an assessed valuation of \$27,901,250, for both land and improvements.

A. Yes, sir.

Q. Are you familiar with the operations of the Getty Square line of the Putnam Division in that section?

A. Yes.

Q. And are you familiar with the services given by the railroad company to the people in that section?

A. I am.

Q. Now, in fixing real estate values, is the transportation facilities an item of valuation?

Mr. McLean: I object to testimony from this witness as to real estate values, that not being an issue in this case. He is a real estate expert but that does not qualify him for any issue in this case.

Exam. Schutrumpf: We have had assessed values put in. Would this be somewhat cumulative?

Mr. Garrity: I want to bring out a separate and distinct point, if I might continue, subject to it being stricken if I don't connect it up.

Exam. Schutrumpf: I will let it go in with this statement, that so far in abandonment proceedings the Commission has taken a uniform position that evidence of this character is not controlling in an abandonment case. If [fol. 400] you want to proceed with that understanding, go ahead.

Mr. Garrity: I understood it when I started, from a statement that you made earlier in the day, Mr. Examiner.

Exam. Schutrumpf: All right, you may proceed.

By Mr. Garrity:

Q. Will you answer the last question?

A. Yes, sir.

Q. Now, assuming that this line was discontinued and the people in this area left without this particular line for going back and forth to New York City, in your opinion would it affect the realty values in this section?

A. It would.

Q. And based upon your experience as a real estate appraiser, could you give the Commission any idea or any opinion of the amount of decrease in valuations that might be suffered in this particular area due to the discontinuance of this particular line?

Mr. McLean: I object to the question.

Exam. Schutrumpf: I think he can answer that.

A. I would say about 10 percent.

By Mr. Garrity:

Q. 10 percent of a figure of some \$27,000,000 is approximately \$2,700,000?

A. Yes.

Q. And that, in your opinion, would be the loss in realty values in that particular section due to the discontinuance of this line?

[fol. 401] A: Yes, assuming that the assessed values are the real values.

Exam. Schutrumpf: And assuming that the assessor wouldn't re-assess it after they went out?

The Witness: Yes.

Mr. Garrity: That is all I have.

Exam. Schutrumpf: Any further questions?

Mr. McLean: No questions.

Exam. Schutrumpf: You are excused.

(Witness excused.)

Mr. Garrity: In order to save time and in view of the letter that we saw from the War Department, I would like at this time to make an offer of proof, through an engineer, that the present line is of military and strategic value.

Exam. Schutrumpf: All right, call him.

Mr. Garrity: I assume from your letter and the one from the War Department—

Exam. Schutrumpf: The mere showing in the correspondence section that the War Department says it has no material value doesn't foreclose the receipt of evidence by somebody who thinks they know more about it than the War Department.

Mr. Garrity: We don't feel that we know more than the War Department.

Exam. Schutrumpf: I shouldn't have said it that way.

Mr. Garrity: We feel that, knowing local conditions, [fol. 402] there are certain factors that have a civilian and military value which should be considered in this abandonment proceeding.

Exam. Schutrumpf: Bring your witness on.

Mr. McVay: Do I understand that the letter from the War Department will be considered at all?

Exam. Schutrumpf: It is not a part of the record.

Mr. McVay: It is no different than any of the petitions, as I see it.

Exam. Schutrumpf: That is right.

Mr. McAnery: We will produce that witness tonight.

Exam. Schutrumpf: All right. Are there any further witnesses to be presented at this time?

(No response.)

Exam. Schutrumpf: In accordance with the previous arrangement, we will adjourn until eight o'clock tonight.

(Whereupon, at 5:15 o'clock p. m., the hearing was adjourned until eight o'clock p. m.)

[fol. 403]

Evening Session

8:00 P. M.

Exam. Schutrumpf: We will proceed, gentlemen.

JOHN F. REIGART was sworn and testified as follows:

Direct examination.

By Mr. Gray:

Q. Dr. Reigart, are you a resident of the City of Yonkers?

A. Yes.

Q. How long have you resided here?

A. Since 1895.

Q. And where do you reside, with respect to the Getty's Square Branch of the Putnam Division?

A. I came out by that. I built a house on the top of Caryl Hill, on top of Caryl Station.

Q. Has it been your practice to use that line in going to and from New York?

A. Yes, for 32 years I daily commuted until I retired and then I used family tickets as long as the transportation was satisfactory.

Q. And does Mrs. Reigart still use the line?

A. She does when there is a convenient train.

Q. Are you in favor of discontinuing the line?

A. No. I should be very sorry to have it discontinued.

Q. In times past, when they had night service, did you [fol. 404] find it much more convenient than it is now?

A. Yes, if we missed the midnight train we would use the one o'clock train. I had a neighbor who was a proof reader in the Sun. He used to come home at four o'clock in the morning.

Q. They had all night service?

A. Yes.

Q. This was how long ago?

A. They had all night service when we came out and for some years afterwards.

Q. Do any of your family use a train beside you and your wife?

A. Yes. I have four daughters and when they are home, at Christmas and other times, they do use it.

Q. And before they left?

A. They always used the family tickets.

Mr. Gray: You may inquire.

Cross-examination.

By Mr. McLean:

Q. What business are you in?

A. Professor at Columbia University and also principal of public schools in New York City.

Q. You are not now a commuter?

A. No, I retired in about 1927.

Q. No further questions.

Mr. Gray: Thank you, Doctor.

[fol. 405] (Witness excused.)

JOHN W. TOOLEY was sworn and testified as follows:

Direct examination.

By Mr. Gray:

Q. Are you a resident of the City of Yonkers?

A. I am.

Q. Do you use the Getty Square Branch of the Putnam Division?

A. I do.

Q. Where do you take the train?

A. In Caryl Station.

Q. And where is your office?

A. 1 Broadway.

Q. You are in the steamship business?

A. I am in the steamship business.

Q. How long does it take you, ordinarily, to reach your place of business using the route including the Getty Square Branch?

A. From the time I leave Caryl Station to the time I reach 1 Broadway is exactly one hour.

Q. Have you ever made that trip by the street car and subway?

A. I have.

Q. And when you have done so how does the running time compare with your prior running time?

A. I would say, on the subway and street car, it takes me an hour and a half, a difference of a half hour.

Q. Where is your residence?

[fol. 406] A. 580 Van Cortlandt Park Avenue.

Q. How far is it from your residence to the trolley car that you take?

A. Trolley car would be one block away, on McLane Avenue and I go to Woodlawn. If I went to Broadway I would have seven minutes walk to Broadway.

Q. You find the Woodlawn route is quicker than the Broadway route?

A. Why, yes, in my case it is because it takes me right down to Bowling Green station, which the Seventh Avenue branch of the I. R. T. does not do.

Q. Are you in favor of the discontinuance of this line?

A. I am not, sir.

Mr. Gray: You may cross-examine.

Cross-examination.

By Mr. McLean:

Q. The Nodine bus from the Club Transportation Company goes very close to your residence?

A. It does; it passes in front of the door.

Q. How long a trip would it be for you to take that line over to the Ludlow Station on the Hudson Division?

A. Well, I would say, under present day conditions, with the school children riding the bus, particularly school children going to Nathaniel Hawthorne School, it would take me a good fifteen minutes.

Q. How long would it take from Ludlow, using that line down?

[fol. 407] A. From Ludlow to where, Grand Central?

Q. To your office.

Q. Well, it would take me from there probably another thirty five minutes on the train, at least twenty minutes on the subway.

Q. It would be about equivalent to the present trip you are taking on the branch to be abandoned, would it not?

A. It is, if you are speaking of the time difference, yes.

Mr. McLean: That is all.

Redirect examination.

By Mr. Gray:

Q. Have you taken the bus, the No. 10 Hill bus, from Broadway over to your house or from Ludlow?

A. I have taken it, yes.

Q. During the peak rush?

A. Not during the peak rush, no, I have not.

Q. Well, have you seen the No. 10 Hill Bus pass along Caryl Avenue about the time you have arrived home?

A. I have.

Q. Or during your ordinary hours?

A. During—you are speaking of the business hours?

Q. Yes. What has been your observation as to the capacity to which those buses have been filled?

A. Those buses, to my mind, are crowded to capacity right now, particularly with school children, as I said before.

Q. And in the evening, on the way back?

[fol. 408] A. In the evening they are crowded, also.

Q. By that do you mean they are packed, or just all the seats are taken?

A. All the seats are taken and people are standing in there.

Mr. Gray: That is all.

By Mr. McVay:

Q. Say it takes fifteen minutes to go from Grand Central to Bowling Green. That is just the running time on the subway?

A. That is what I am speaking of.

Q. And it takes you from five to ten minutes to get off the Putnam Division train and walk over through the terminal to the subway and make the connection?

A. That is quite true, yes.

Q. So that instead of it taking you sixty five minutes it takes you seventy five minutes?

A. Yes, if you don't include the walking time there. The time I said on that bus, fifteen minutes, is only approximate.

Q. And it also requires you to go up and down stairs to a great extent, does it not, going through the terminal?

A. Yes.

Q. And down into the subway?

A. Certainly.

Q. And it is particularly bad on the reverse trip?

A. Well, coming up you have the same thing, climbing stairs one way or the other.

[fol. 409] Q. It is harder to climb up?

A. Yes, it certainly is.

By Mr. Gray:

Q. What train do you usually take in the morning?

A. Eight thirteen out of Caryl.

Q. In the evening what train do you usually take?

A. Well, in the evenings it is either the five thirty six or the five fifty four. Sometimes it runs later.

Q. Out of Grand Central?

A. Out of Grand Central.

Q. And where do you transfer from the main line train?

A. Going down in the morning going to University. At night I change at Highbridge.

Recross-examination.

By Mr. McLean:

Q. You are in the steamship business?

A. Yes.

Q. If your line were losing \$70,000 a year would you make—

Mr. McVay: Tell him you are making money on your other lines.

By Mr. McLean:

Q. Would you continue to operate that portion of the business that was losing money?

A. It all depends on what my capacity in the business was.

Q. You are not subject to regulation by the Interstate Commerce Commission?

A. No, I am not. We might be in the freight end of it. I [fol. 410] am not a freight man.

Mr. Gray: Wasn't your steamship business losing money up until the start of the European War in 1939?

The Witness: We have been losing money right along.

Mr. Gray: And you still kept in operation?

The Witness: We kept in operation and we only discontinued the service when the navy requisitioned our ships.

Mr. McAneny: Mr. Tooley, if you were losing money in your steamship business you would make a very careful study to find out how you could avoid that and to build up your business, wouldn't you?

The Witness: Why, yes, I would have to take that into consideration.

Mr. McAneny: And if there were obvious means such as a railroad might see for building up its business you would avoid yourself of them, wouldn't you?

The Witness: Well, of course you can't compare the steamship business to the railroad transportation.

Mr. McAneny: But the question you were asked was a business question by a representative of the railroad and I am simply saying that, in an ordinary business—

Mr. McLean:

Mr. McAneny: If the business found what the obvious reason was for the loss, if there was a loss, it certainly would correct it, wouldn't it? Now, you don't think there is enough on this record to indicate how you could increase [fol. 411] your business?

Mr. McLean: I haven't found the obvious business yet.

Mr. McAneny: You are turning customers away, turning away business to the bus lines, aren't you?

Exam. Schutrumpf: Well, that is enough.

Mr. Gray: Are you through with Mr. Tooley?

Mr. McLean: Yes.

(Witness excused.)

JOHN J. BLACKFORD was sworn and testified as follows:

Direct examination.

By Mr. Gray:

Q. Your residence?

A. 70 Saratoga Avenue.

Q. Are you a commuter on the Getty Square Division of Putnam?

A. I am.

Q. How long have you been a resident of Yoakum?

A. Forty two years.

Q. And have you been a commuter during that period?

A. Considerable portion of it.

Q. Where do you take the train?

A. At Lowerre Station.

Q. And where do you transfer to the main line to go to Grand Central?

A. Transfer at University Heights and go to Grand Central.

[fol. 412] Q. Then you take the Eight nine from Lowerre?

A. I take the seven forty eight from Lowerre.

Q. Where is your office?

A. 370 Lexington, corner of 41st Street.

Q. Using your present means of transportation, how long does it take you to arrive at your office after leaving your house?

A. Forty five minutes.

Q. Have you ever tried to cover the same route by taking the—not the same route; reach the same destination by using the subway and the surface trolley?

A. Taking the McLane line and going down from Woodlawn to Lexington Avenue takes a little better than an hour.

Q. So if you were forced to use that route, through the discontinuance of the Putnam Division you would be losing an hour a day?

A. At least a half an hour every day.

Q. Are you in favor of the discontinuance of this portion of the Putnam Division?

A. I am not.

Q. Have you had occasion to observe the buses on the Nodine Hill Line in the region of the peak hours?

A. No, I have not, because they don't pass near where I live.

Mr. Gray: You may cross-examine.

Cross-examination.

By Mr. McLean:

Q. The Park Hill Line runs rather close to your residence, [fol. 413] doesn't it, Mr. Blackford?

A. No, it runs through Lowerre or Caryl Avenue, which is about two blocks away from where I live.

Q. So by walking those two blocks to the bus line, taking the bus there, you could go to Ludlow Station and take the Hudson Division train down directly to Grand Central, could you not?

A. I could, yes.

Q. It would take you approximately the same time going that route as the present route that you take by getting on at Lowerre and transferring at Highbridge?

A. No, it would take me longer.

Q. How much longer, if you know?

A. Probably fifteen minutes, each way. It takes at least fifteen minutes from Saratoga Avenue and Caryl Avenue to go to Ludlow Station.

Q. How much wait do you have at Highbridge that you ought to deduct?

A. I don't know of any wait. We are still climbing the stairs from the Putnam Division train when the main line train is coming in.

Q. I am glad to hear that.

A. It is one of the few times it happens. That is the only train.

Q. Coming home at night does it happen that way?

[fol. 414] A. No, I have about five minutes to wait at Highbridge.

Q. So that it would only take ten minutes longer at night, then?

A. Approximately ten minutes longer.

Mr. McLean: That is all.

Mr. Gray: Thank you, Mr. Blackford.

(Witness excused.)

HERMAN LIPS was sworn and testified as follows:

Direct examination.

By Mr. Gray:

Q. Do you reside in Yonkers?

A. I do.

Q. Do you commute on the Getty's Square Division of the Putnam Railroad?

A. Yes, I do, sir.

Q. How long have you been commuting?

A. Since 1939.

Q. What station do you use on the Putnam?

A. Caryl Avenue, sir.

Q. And do you go to Grand Central or some other station?

A. I go to Sedgwick Avenue.

Q. From Sedgwick what route do you take?

A. I walk across the bridge or take the shuttle and take the Eighth Avenue down to Canal Street.

Q. Is that where your office is?

[fol. 415] A. Close by, yes.

Q. Where do you reside in Yonkers?

A. At 122 Saratoga Avenue.

Q. Have you ever tried going from your residence to your office by using the subway and the trolley?

A. I have, sir.

Q. How long does it take you from your house to your office by using the Putnam Division and getting on at Caryl?

A. It takes approximately fifty minutes in the morning.

Q. How long does it take you by using the subway and the surface car?

A. It takes at least an hour and fifteen minutes.

Q. And have you, on the reverse motion, have you come from New York to your residence by subway and surface?

A. I have, sir.

Q. How do you find that running time?

A. Well, the running time is approximately an hour and twenty minutes in the evening.

Q. And what does your running time, by using the Putnam coming up from the office—

A. It is approximately an hour in the evening.

Q. There is about a five minute lag in the evening over the morning time?

A. That's right.

Q. Are you in favor of the discontinuance of the Getty [fol. 416] Square Branch?

A. Decidedly not, sir.

Q. What line of business are you in?

A. I am in the instrument parts business, making parts for aviation instruments.

Q. Have you observed the Nodine Hill buses around the peak traffic hours?

A. I have observed them, although I don't use them.

Q. What has been your observation as to the capacity to which they have been filled?

A. I always found them very full.

Q. Is that in the evening or in the morning or both?

A. Well, mostly in the evening, sir. I don't see them in the morning.

Q. What train do you take in the morning?

A. Six fifty four.

Q. How long a wait do you have at Highbridge—you don't go to Highbridge?

A. I don't.

Mr. Gray: You may cross-examine.

Mr. McLean: No questions.

By Mr. McVay:

Q. Where do you go when you get to Sedgwick Avenue?

A. I go to the Eighth Avenue Subway. I take the shuttle, or walk across, if it is a nice day. The time is about the [fol. 417] same.

Mr. Gray: Thank you, Mr. Lip.

(Witness excused.)

K. J. CARROLL.

Direct examination.

By Mr. Gray:

Q. Do you take the train at Lowerre?

A. No, Caryl Avenue.

Q. What train do you usually take in the morning?

A. Eight thirteen or eight forty seven.

Q. And where is your place of business?

A. 415 Lexington Avenue.

Q. That is near what street?

A. 43rd Street.

Q. So you go there right directly from Grand Central Station?

A. Right across the street.

Q. Where do you reside in Youkers?

A. 111 Caryl Avenue.

Q. Have you taken any notice of the time that is required for you from the time you leave your home to the office using this route?

A. I would say between forty two and forty five minutes.

Q. Have you also gone from your home to your office by means of the subway and the surface trolley?

A. I have.

Q. And how does the time required for that trip compare [fol. 418] with the time on the Putnam Division?

A. About twenty or twenty five minutes more.

Q. For the trip?

A. Yes.

Q. And in the reverse motion have you made the two trips by the two methods of transportation?

A. Yes.

Q. And how do they compare?

A. It takes longer coming back and, in addition to that, you don't get a seat in the subway.

Q. Do you find the subways crowded?

A. Hard to get on them at 42nd Street.

Q. That is which?

A. You wouldn't get a seat until you get way up beyond University Avenue or, at least, up to Fordham station.

Q. That is on the Lexington Avenue?

A. Lexington Avenue.

Q. And have you tried the other side? The Broadway subway?

A. I have not lately.

Q. How do you find that as to crowding?

A. Just as crowded. You wouldn't get a seat until you get up to about 181st Street.

Q. Are you in favor of discontinuing this branch of the Putnam Division?

A. I am not.

[fol. 419] Mr. Gray: Your witness.

Cros-examination.

By Mr. McLean:

Q. What business are you in?

A. Real Estate and Insurance.

Q. The Caryl Street bus goes past your house, doesn't it?

A. Not past the house, no. It goes along Van Cortlandt Park Avenue, which is down at the corner of Caryl Avenue.

Q. Very close to it, however?

A. Very close to the house.

Q. How long would it take you on that bus over to the Ludlow Station?

A. Well, on the bus itself it would take about, I would say, about ten minutes, but you would have to allow a certain amount of time for the connection. I have waited on the corner twenty minutes by my watch for that bus.

Q. The buses meet the trains at Ludlow, however, don't they?

A. They meet them coming up at night but in the morning, why, not so sure. At night you can meet them because I have taken the later trains and the buses come along right after the New York train got into the Ludlow Street Station.

Q. How much time would it take you by using the Xodine Hill bus line to Ludlow and the Hudson Division train to your office in that manner?

A. Well, the running time on the train, as I recall it, is about the same from Caryl Avenue and the time you would [fol. 420] lose is waiting for your bus and riding over from the corner over to the station and, in addition to that, there is a fare of five cents on the bus and the fare from the Ludlow Street Station is more than from the Caryl Avenue Station.

Q. And you have, on the route you now travel, you have a wait of approximately eleven minutes for a train at Highbridge, do you not?

A. On the eight forty seven, since they turned it back to eight forty seven, we have quite a wait. When they used to run the one at eighty forty or forty two we used to make a connection right away. In fact, we would have to run to get the train some mornings.

Q. So, balancing it on the present schedule, it would be about the same running time from your house, using the Ludlow Street Station, as it would with the present connection?

A. Well, I tell you maybe five minutes longer.

Q. Depending on your wait for the bus and the connection you make?

A. Yes.

Q. You don't have any trouble getting a seat on the southbound subway, taking the Broadway Avenue Subway going down to 242nd Street, do you?

A. No.

Mr. McLean: That is all.

Redirect examination.

By Mr. Gray:

Q. Your complaint is coming up at night when you are [fol. 421] tired?

A. That's right.

Q. You find that very inconvenient?

A. I never use it if I can possibly help it.

Q. How long have you been a commuter?

A. Fourteen years.

Q. And has your commuting been on this line all the time?

A. All the time.

By Mr. McVay:

Q. Why don't you go by way of the Broadway Car Line to the Broadway Subway?

A. Well, if I had to do that I would move out of Yonkers.

Q. Do you want to elaborate on that? Tell us why it is you don't like it.

Mr. McLean: I don't think it is necessary.

Mr. McVay: It may save time.

The Witness: It is inconvenient for me to use the Broadway Subway, because that takes me down to 42nd and Seventh Avenue and I would have to take the shuttle at Seventh Avenue to go to Lexington Avenue.

By Mr. McVay:

Q. And it is very crowded?

A. At that time there is an awful mob.

Mr. Gray: Thank you, that is all.

(Witness excused.)

Q. A. OLSTAD was sworn and testified as follows:

[fol. 422] Direct examination.

By Mr. Gray:

Q. Mr. Olstad, where do you reside?

A. 90 Caryl, sir.

Q. Are you a commuter on this branch, the Getty Square Branch of the Putnam?

A. I am, sir.

Q. How long have you been a commuter there?

A. About seventeen years.

Q. How close to the station do you live?

A. Right across the street from the station.

Q. In Chando Court?

A. Yes, sir.

Q. Large apartment house?

A. Yes, sir.

Q. How many stories high?

A. Six.

Q. Elevated apartment?

A. Yes, sir.

Q. About how many families in there?

A. Sixty.

Q. Do you know whether a large proportion of those families are commuters?

A. A large proportion of them are commuters, yes, sir.

Q. What line of business are you in?

A. Sales engineer.

[fol. 423] Q. Where is your place of business in New York?

A. 342 Madison Avenue.

Q. 43rd Street?

A. Yes, sir.

Q. When you take the train at Caryl where do you transfer to the main line?

A. Highbridge most of the time.

Q. What train do you take from Caryl?

A. I take most any train that runs that part of the morning, early or late.

Q. Including the bankers' train?

A. Yes, sir.

Q. How long does it take you from your house to your place of business?

A. Well, I make it in thirty-five minutes.

Q. Have you tried the same trip by subway and surface car?

A. Yes, sir.

Q. And how long does that take you from your house to your place of business?

A. Well, I don't travel that way for business. When I go down for business on that train I usually allow an hour and a half.

Q. To catch a train at Grand Central?

A. Yes, it is not too much. That is the same as going down to Grand Central, which is the same spot.

[fol. 424] Q. And, coming in the reverse direction, have you observed any difference between the running time on the Putnam and taking the surface car and subway?

A. I would say the same difference.

Q. About a difference of how much, half an hour?

A. About an hour.—Fifty-five minutes, I would say.

Q. Have you observed—strike that. Do you ever take the train from Ludlow and come over on the bus?

A. Once or twice.

Q. Was that during the peak hours?

A. No, sir.

Q. Have you observed the Xodine Hill bus going through Caryl Avenue during the rush hours?

A. Only occasionally.

Q. So you are not able to express any statement now as to your observation of the capacity of which they are filled?

A. No, sir.

Mr. Gray: You may cross-examine.

Cross-examination.

By Mr. McLean:

Q: How does the time compare, using the bus from Ludlow Station to your house, as against using the Caryl Station and transferring at Highbridge? I am speaking now of going to Grand Central area.

A. I would say it would take twenty-five minutes more.

Q. How long does it take on the bus to Ludlow?

[fol. 425] A. Well, that depends how much time I have to wait for the bus. I don't know what the running time is. I would allow myself twenty-five minutes if I take the bus in front of my house to catch a train.

Q. How much time do you figure on at Highbridge for making connections with the Hudson Division train?

A. If I make a quick connection and probably up to eleven minutes, somewhere around there.

Mr. McLean: That is all.

By Mr. McVay:

Q. One of the influencing factors in your moving to 90 Caryl Avenue is the fact that these trains operated as they did?

A. Yes, sir.

By Mr. Gray:

Q. Are you in favor of the discontinuance of the branch?

A. Emphatically not.

Mr. Gray: Thank you, Mr. Olstad.

(Witness excused.)

ANNE HACKETT was sworn and testified as follows:

Direct examination.

By Mr. Gray:

Q. Where do you reside?

A. 166 Saratoga Avenue.

Q. Are you a commuter on the Getty's Square Branch of the Putnam Division?

[fol. 426]. A. Yes, sir.

Q. How long have you been a commuter?

A. I should say about twenty years, but my family for about thirty-five years.

Q. What station do you take?

A. I get off at Caryl.

Q. You get—

A. I get on at Caryl.

Q. Where is your place of business?

A. 125th Street and Lenox Avenue.

Q. And do you change to the main line of the New York Central at Highbridge?

A. When I go down on the eight-fifteen I change at University and at eight-forty-seven I change at Highbridge.

Q. And you get off at 125th Street?

A. Yes, sir.

Q. Have you observed the length of time it takes you to reach your office from your house, using that route?

A. When I ride across on the trolley I should say about forty minutes.

Q. That is the trolley you cross at 125th Street?

A. Yes, and if I walk it is a little bit more.

Q. How much do you say if you took the trolley?

A. I should say thirty-five or forty minutes.

Q. From your house?

[fol. 427] A. Yes.

Q. Have you also gone to your place of business from your house using the subway and the street car?

A. Yes, I have, and I should say it takes me an hour and ten minutes. It is very inconvenient, because I have to walk up the hill at Caryl, which is about five blocks, then take the street car and then take the subway and, at 125th Street, take the bus or street car across, which is quite a long ride.

Q. Do you take any particular train or do you take any train in the morning?

A. Sometimes I get the eight fourteen and sometimes the eight forty-seven.

Q. Do you have occasion to use the bus line at all?

A. Yes, I have and I have been very unfortunate, evidently just about missing one and waiting about fifteen minutes for the next one.

Q. Which line is that, the Park Hill or Nodine Hill?

A. Nodine Hill bus.

Q. Have you had occasion to use the Nodine Hill bus during the peak hours?

A. Well, I have used the bus from Ludlow over to Caryl and I have been unfortunate enough to have to wait in the cold for about fifteen minutes. It seemed longer than that. And the buses are always crowded.

[fol. 428] Q. By that you mean they are standing?

A. Yes.

Mr. Gray: You may inquire.

Mr. McLean: No questions.

Mr. Gray: Thank you.

(Witness excused.)

ANITA VINCENT was sworn and testified as follows:

Direct examination.

By Mr. Gray:

Q. Where do you reside?

A. 70 Saratoga Avenue.

Q. Have you been a commuter very long?

A. It will be eight years in December.

Q. And you used that to go to school first?

A. I have been working all that time.

Q. Where do you work?

A. Metropolitan Life, on 23rd Street and Madison Avenue.

Q. What route do you follow now with the Putnam going to work?

A. I take the eight thirteen from Lowerre and change at University Heights to Grand Central and then I take the Fourth Avenue, Park Avenue bus down to 23rd Street. And the exact time is forty-seven minutes.

Q. From your house to the office?

A. It is about a minute to the train from the house, so probably forty-eight minutes.

[fol. 429] Q. So you get in the office just under the wire?

A. I don't have to be in until nine fifteen.

Q. Have you tried making the trip from your house to the office by using the subway and surface line?

A. Yes, I have.

Q. And how does that running time compare with the time you have just described?

A. Well, at least twenty-five minutes longer on the Broadway line and, maybe, a little bit less on the Lexington Avenue subway.

Q. That is going down to Woodlawn?

A. Yes.

Mr. McVay: A little bit less than twenty-five minutes longer?

The Witness: That's right.

Mr. Gray: You may cross-examine.

Mr. McLean: No questions.

Mr. Gray: Thank you, Miss Vincent.

(Witness excused.)

Mr. Gray: I think, Mr. Examiner, the rest of the testimony will be along the same line. Would you stipulate, Mr. McLean, that the other 250 witnesses here will testify to the same?

Mr. McLean: Nor would I admit ~~there are~~ 250 here. I [fol. 430] wouldn't make such a statement. Do you want to make such a statement on the record and have it for what it is worth? But I will not stipulate as to what people are here to testify.

CHARLES W. MERRITT WAS SWORN and testified as follows:

Direct examination.

By Mr. Gray:

Q. Where do you reside?

A. 5 Boulder Place.

Q. Yonkers?

A. Yes.

Q. What is your business?

A. Attorney.

Q. Practicing in New York?

A. 25 Broadway.

Q. Are you a commuter on the Yonkers Branch?

A. Yes, I have been a commuter on there since 1920.

Q. And what station do you usually use?

A. Well, for many years I lived in Saratoga Avenue near Caryl Station and used that. And then, when I moved to Boulder Place, I started to use the Lowerre Station until I discovered that, through a peculiar setup in the railroad's tariff, you could ride to Caryl for eight cents less, so I have been riding to Caryl for the last year or two. The railroad has not found that out yet. I paid less on the train than you [fol. 431] do if you buy a ticket.

Q. Now, how long does it take you from your house to your office using the Putnam Division?

A. To the office?

Q. Yes.

A. One hour.

Q. One hour flat?

A. Yes, that is the best possible time.

Q. And how does that compare with your time from your office to your house?

A. From the office to the house, about the same. It takes me seven or eight minutes to walk to Caryl Station, where if I go to Lincoln it takes the same time but there are fewer trains over there, so I can seldom catch a train there and I add to that thirty-five minutes minimum to Grand Central, fifteen minutes to Bowling Green, the best possible running time either way if I just catch a train coming back.

Q. So it is about an hour each way?

A. About an hour.

Q. As a lawyer you often work late?

A. My hours have been very irregular for the last ten years. I was commuting out to the World's Fair, where I was counsel for the Fair and had an office, so I used the Long Island Railroad from Pennsylvania Station during the four years of that time.

[fol. 432] Q. Now, when you come home at night, after the Yonkers Branch has practically gone out of commission at sundown, do you use the subway or do you use the train to Ludlow?

A. I have used the train to Ludlow and taken the Park Hill bus across, which is not a very satisfactory method. In the first place, the fare to Ludlow is thirty-three cents and the bus an additional five, thirty-eight cents, and the running time is slightly better if you make a good connection in coming up by subway and the McLane Avenue car, where you make a connection. Both methods are very erratic, particularly in the winter time.

Q. Have you observed the buses during the rush hour at Yonkers?

A. No, I can't say that I have ridden on the buses particularly at any commuting hour, because then I come to Caryl Station. My time in taking a bus is usually late at night or in the middle of the day when the trains are not running. They are always well filled then, but not overcrowded, at that time.

Q. Boulder Place is pretty up in the air, is it not?

A. Yes, up on the hill.

Q. So that, if you were to take a train to Lincoln and walk from Lincoln up to your home, it would be quite a climb, would it not?

A. That is the same—it takes the same time, because it [fol. 433] is perhaps shorter in actual yards, but it is a

steep hill and the service over there is very poor and the cinders are practically unbearable. That line——

Q. That is a steam line?

A. That line is practically going out of business too. And I might put in the Lincoln Station is not fit to shelter a herd of cattle. It is always locked up. No telephone, no shelter on a rainy day. So the handful that use that station are unprotected. And on holidays, the last occasion I rode there on a holiday the train which was scheduled didn't operate, although it was on the time table to operate that day.

Mr. Gray: You may inquire, Mr. McLean.

Cross-examination.

By Mr. McLean:

Q. You didn't buy a monthly commutation ticket?

A. No, I do not, because I have been riding the Sedgwick Avenue on some occasions, going down on the Eighth Avenue subway. For many years I used the Ninth Avenue El. At night, when I leave the office, if I have a minute of time to catch a train at Grand Central I go that way. If I find that I have five or ten minutes in which I could wait at Grand Central I would rather take the Eighth Avenue subway up from Fulton Street. I can walk to Fulton Street, take the Eighth Avenue up and catch the same connection at Sedgwick Avenue. And in the mornings I do not always go down on the Putnam. I always go on Saturdays, holidays, [fol. 434] vacations, summertime, every morning and every night. But the rest of the year I only return regularly on the Putnam coming back.

Q. The fact is you don't use the line often enough to make it worth while to buy a commutation ticket?

A. No, I only use it, approximately, forty rides a month.

Mr. McLean: That is all.

Mr. Gray: Thank you, Mr. Merritt.

By Mr. Garrity:

Q. If there were complete service on the lines and trains running at night as there have been in years gone by would you be able to use it more times than you do at present?

A. I always did during the first ten years that I started work downtown, from 1920 to 1930. When the service was better I used that morning and night.

Q. Both ways?

A. And so did hundreds of others, both ways.

Q. Have they discontinued the night service entirely on that route now?

A. Well, I don't know the later trains. It is my recollection that the train which I caught very often, which left Sedgewick Avenue at seven fifteen, I used to catch regularly when I was working out at the World's Fair, they discontinued that train by posting a small notice somewhere and at no substitute whatsoever. And, to my knowledge, there are no trains now after that time.

[fol. 435] Q. That was due to the discontinuance of the trains by the railroad company that you had to seek other means of transportation at night coming up?

A. If I couldn't catch the six forty-two from Sedgewick on those nights I just came home and continued from Pennsylvania Station up by subway, either to Van Cortlandt up to Caryl Avenue and walked across,—it takes about twelve minutes—or else came up to Woodlawn.

Q. To your knowledge are there other people who have used the line during a period of years that have had to obtain other means of transportation due to discontinuance of certain trains?

A. I could probably name fifty of my own acquaintances who used to ride in that train, if I was given time to list them.

Mr. Gray: And who do not use them any more?

The Witness: No, they still work in New York.

Mr. Gray: And they still live in Yonkers?

The Witness: They still live in Yonkers. Probably sorry for it.

By Mr. Garrity:

Q. Mr. Merritt, you said they discontinued the line by posting a little notice. You mean they didn't seem—

Mr. McLean: I suggest there is no need of going into that. We have quite a number of people.

[fol. 436] Mr. Garrity: You mean I might bring something out that might be embarrassing?

Mr. McLean: We have taken the time on the record now, you might as well get it over with.

By Mr. Garrity:

Q. These notices that you spoke of, were they posted for the convenience of the rider so that everyone was ad-

vised, without any trouble, that the lines were discontinued?

A. Well, the night that the seven fifteen was discontinued for the first time there was the wife of one of the conductors waiting for it. One whom I have known for many years, and when the train didn't appear we asked the agent "Where is the seven fifteen?" He said "They have stopped it." I said "Why don't they give us some notice?" He said "We had a notice here two weeks ago, posted up in the bulletin board." I said "Where is it now?" He said "We took it down, we had it up for a long while."

Q. How big were the notices?

Exam. Schutrumpf: I don't think we need go into that any more.

Mr. Gray: All right. Thank you, Mr. Merritt.

(Witness excused.)

ALVIN SPIVAK was sworn and testified as follows:

Direct examination.

Q. Where do you reside?

[fol. 437] A. 64 Hawthorne Avenue, Yonkers.

Q. Are you a commuter on the Yonkers Branch of the Putnam Division?

A. At present it is intermittent, it was regular until about a year ago.

Q. Where is your place of business?

A. I work at 64th Street and Third Avenue, in the Third Avenue Railway System shops.

Q. And when you take the Yonkers Branch to your place of business what route do you follow?

A. What I generally do is go by street car, because initially, my pass makes the railroad service rather expensive. But coming up in the evening I take the Lexington Avenue train from 68th Street, changing for the express at 80th, and come up to 167th Street, where I take the shuttle train. I generally can manage to catch the four fifty one from that point up to Getty's Square.

Q. Taking that route, what is your running time from your office to Getty's Square?

A. Approximately an hour, possibly a few minutes less.

Q. When you can't make connections and you use some other route, what route do you follow?

A. I come directly up on the Jerome subway from 86th Street to Woodlawn and take the No. 4 trolley. The time is, approximately, one hour and twenty minutes.

[fol. 438] Q. So the difference is twenty minutes in the two routes?

A. Longer.

Q. Have you had any experience in the suburban transportation problem?

A. Quite a bit, if you call it actual experience. It has been my interest for a good number of years. I have followed electric railway transportation for about twelve years and have made very, very close studies of it and I consider myself as well versed in it as the majority of railway executives, present, or not present, tonight.

Q. How old are you?

A. I am going to be twenty one in May. I am a member of the Electric Railroaders Association.

Q. Have you made any study of the possibility of converting the branch from Getty's Square to Sedgewick Avenue and 155th Street into a sort of suburban trolley line?

A. I certainly have.

Mr. McLean: I object to this witness testifying to this. His expertness has not been sufficiently established. He has no experience in the railroad business.

Exam. Schuttrumpf: Well, I think we will save time. His statement is on the record.

Mr. McLean: Do you say you are twenty-one years old?

The Witness: Yes.

Mr. McLean: And you know as much about the railroad [fol. 439] business as any executive?

The Witness: The general knowledge, from the technical viewpoint, with regard to car equipment, railroad equipment, maintenance, very, very extensively, and I think it compares very favorably with the average railroad man. I have, at various times, held discussions whereby I had to answer questions for railroad men, with relation to such details as Sprague's third rail, pneumatic electrical control for multiple unit equipment and other electrical railroad problems that many railroad men allow their subordinates to take care of.

Mr. Gray: Can you answer the questions correctly?

The Witness: Yes. In many cases I have had to correct the gentleman who was speaking to me. I think any test you may want to make will come out in my favor.

Mr. McLean: What books have you studied?

A. I have studied very closely the International Business Course, which I have not taken, but I have studied the electric book very thoroughly and every other bit of material, Transit Journal and other periodicals in mass transportation. Railway Age comes into my hands regularly.

Exam. Schutrumpf: Go ahead.

By Mr. Gray:

Q. Have you worked out any plan, any concrete plan, whereby you can describe, for the use of the present system from Getty's Square to Sedgewick Avenue, such a type [fol. 440] of railroad?

A. Yes. By comparing it with a railroad in actual existence.

Q. That would take all night. What, in substance, what is your suggestion?

A. The idea that this railway, if operated frequently, that is, at regular intervals rather than a time table type system railroad, which it now is, if it was operated like the Philadelphia Western Railway and people knew when they could get it without referring to a time table, it definitely would be more than successful; because the Philadelphia Western, which I have mentioned, is a successful enterprise and connects Philadelphia and Norristown. Yonkers is bigger than Norristown and New York is certainly bigger than Philadelphia. If they can make a go of it there it certainly could be done here.

The operating conditions are very similar and more or less identical. It is a third rail equipped line, average 600 volts, as I say, the same as the Putnam Division now uses. The cars are equipped, also, for multiple unit operation. The most important thing is that they are single units and operatable by one man, which is just what is done under normal circumstances.

Whether the Interstate Commerce Commission would permit it or not, considering the facts that we have carload interchange or we utilize system railroad tracks, remains to [fol. 441] be seen, but it is possible and it is done in the Philadelphia Western very successfully.

Q. In the Philadelphia Western do they also use a steam track?

A. No, they have no interchange. They had freight service at one time but they found they could get along very well without it and its complications does not make it worth while continuing.

Cars operate at, approximately, twenty minute intervals. The headway is shorter during rush hour. And fares are according to a zone system. My suggestion here would be two five cent zones, and if you have ever seen the people just disgorged from the street cars about every minute or every two minutes at 242nd Street Terminal of the Broadway Line getting on to that subway, and if you could imagine just three quarters of them using this new rapid transit service, it just doesn't seem possible that it would continue to be a failure.

The amount of fare would, of course, be less. But the operating expenses would be cut to the bone. Here you have a three man crew at present with two cars. It is rather ridiculous to have two cars with four passengers in them, a motorman and two conductors and expect to make a profit. It is also rather ridiculous to have Park Hill Station and all its property there standing useless and paying taxes and expect to make a profit.

[fol. 442] There are other conditions. I cannot understand why a railroad would point out its own poor connections for reasons that someone should take other facilities. I refer to the Highbridge connection.

Mr. McLean: Are you an attorney, also?

The Witness: No.

Mr. Gray: You may inquire.

Cross-examination.

By Mr. McLean:

Q. You are familiar with the labor conditions on this line, the labor unions and the regulations of the State of New York pertaining to the operation of trains, are you?

A. More or less, in a general way.

Q. You would recommend that the fare would be reduced?

A. I would.

Q. Have you considered the effect of the reduction of the fare at a point at Getty's Square and maintaining the existing fare at Yonkers Station?

A. I don't—oh, you mean competing with your own line.

Q. We put a ten-cent fare at Getty's Square and could we continue to charge the present fare from Yonkers Station?

A. You are worried about the competition, is that it?

Q. I am worried about discrimination and preference of treating the people using one branch different from people using the other branch of our own system.

[fol. 443] A. That may be.

Q. I am asking you, have you considered that?

A. I have.

Q. All right. Could we continue, then, to charge the same fare at Yonkers Station?

A. Not giving the same type service as you are giving now.

Mr. McVay: I think you are asking him legal questions.

Exam. Schutrumpf: You are getting him now to qualify him to pass on rate questions. We've got a New York Commission and Interstate Commerce Commission, suppose you let them take care of that.

Mr. McLean: I am just pointing the effect of connections in one branch would have effect on the other. It would have to reduce the fares on the other branches and that would have to destroy the fare system on the two or three systems of the railroad.

Exam. Schutrumpf: I think the Commission could figure that out.

Mr. McLean: By the time you figure that out.

By Mr. McLean:

Q. Do you know about the full crew bill in New York?

Mr. McVay: I think that is immaterial whether he knows about it or not.

The Witness: Does the full crew bill pertain to rapid transit electric cars? If so, how is the New York Transit [fol. 444] Electric Railway getting along with two men on the whole train?

Mr. McLean: You are the person being questioned.

By Mr. McLean:

Q. Where do you live?

A. 64 Hawthorne Avenue.

Q. What station is that closest to?

A. Getty's Square.

Q. Is it just as close to the Yonkers Station?

A. It is, but I cannot get my subway connection for 65th Street and via your Hudson Division there is no station that is very convenient. 125th Street is the best.

Q. In order to use your pass and go down a Street Railway system you want to continue to use this Getty Square Branch Station, rather than the Yonkers Station which is just as close?

A. You didn't understand. My using the Getty Square Branch does not in any way, doesn't entitle me to use my pass on the whole trip.

Q. Why can't you just as well use the Yonkers Station then?

A. Because I explained the connections in New York don't allow that because I cannot get the Lexington Avenue subway by using your Hudson Division.

Q. You can't get to the Lexington Avenue subway by using the Hudson Division?

A. Not without quite a walk at 125th Street, if that is [fol. 445] what you refer to.

Q. It is a walk of one block, is it, you are able to take?

A. It is, but then the fare differs.

Mr. McLean: All right, that is all.

By Mr. McAneny:

Q. You are employed in the shops of the Third Avenue Railroad Company?

A. Yes, sir.

Q. And how long have you been employed there?

A. Very recently, within the last month.

Q. Within the last month?

A. Yes.

Q. And where were you employed before?

A. Yes, I was with the Burnham Boiler Corporation in the lab.

Q. And what was the nature of your work?

A. Technical and mechanical work, in the efficiency test of boiler combustion engineering.

Q. Engineering work?

A. Combustion engineers.

Q. That is all.

Mr. Gray: That is all.

(Witness excused.)

ROBERT HOFFMAN WAS SWORN, and testified as follows:

Direct examination.

[fol. 446] By Mr. Gray:

Q. Where is your residence?

A. 18 Stone Street, Yonkers.

Q. Are you a commuter on the Yonkers Branch?

A. I am.

Q. How long have you commuted?

A. About 15 years, the last five years, regularly.

Q. What station do you take?

A. Caryl Station.

Q. And where is your place of business in New York?

A. 180 Madison, that is at 34th Street.

Q. What means of transportation do you take to get to your office now?

A. Caryl Station to University Heights on the S:13, from Caryl to Grand Central Station. I walk down to 34th Street.

Q. Have you observed the length of time from your house to your place of business?

A. Yes, 50 minutes.

Q. And how is the time on the reverse trip?

A. There is at least 15 minutes more time taken. That is by way of the Lexington Avenue subway and the No. 4 trolley car.

Q. I think you are a jump ahead of me. May I ask what is the No. 4 trolley?

A. McLean Avenue.

Exam. Schutrumpf: Do you come back differently than [fol. 447] you go?

The Witness: No, the same way.

Exam. Schutrumpf: No, the same way? Mr. Gray was asking you how long it takes you to come back.

Mr. Gray: Yes.

By Mr. Gray:

Q. You have described the way you went to the office. Now, when you come back the same when—

A. Yes, with a change at High Bridge instead of University Heights.

Q. How does the running time compare with the trip down?

A. It is just a little longer, because the wait at the connections is a little longer on the train I usually take.

Q. At High Bridge?

A. That is right.

Q. This is the question that you answered before: When you come up by subway from your office to your home, and take the surface line, what is your running time under those circumstances?

A. About an hour and ten minutes.

Q. So it differs, the difference is about how much?

A. About 15 minutes. Now, 15 to 20 minutes.

Q. If this line were discontinued, it would mean an additional half hour traveling time for you every day?

A. Much more inconvenience, yes.

Mr. Gray: You may inquire.

[fol. 448] Cross-examination.

By Mr. McLean:

Q. Where is Stone Street?

A. That runs between Van Cortlandt Park Avenue and McLean Avenue, sort of makes a triangle with Intervale.

Q. You could take the McLean Avenue surface Line over to Lincoln Station, could you not?

A. Yes, I guess so, if it ran often enough.

Q. Or you could take the Park Hill Line over to the Park Hill Bus Line over to Ludlow Station?

A. The Nodine Hill would be the better line to take to Ludlow Station. I would walk to the corner of Van Cortlandt Avenue, that is the No. 2 bus, if I could get on. I have tried that one morning when I was going north from Ludlow Station at the commuting time, and it was entirely too crowded, and I had to wait for a second bus.

Mr. McLean: That is all.

(Witness excused.)

Mr. Gray: Is there any one present from the Consolidated Shipbuilding Company at Morris Heights?

(No response.)

Mr. McLean: Let the record show there was no response.

Mr. Gray: Certainly, no response was given.

THOMAS A. GREEN, sworn, and testified as follows:

Direct examination.

[fol. 449] By Mr. Garrity:

Q. Where do you live, Mr. Green?

A. 90 Saratoga Avenue.

By Mr. Gray:

Q. Do you take the train at Lowerre?

A. Yes, sir.

Q. How long have you been commuting?

A. Well, upward of 30 years, not continuously, but upward.

Q. Intermittently.

A. Yes.

Q. From Lowerre Station?

A. Yes.

Q. Where is your place of business?

A. 45th Street and Madison Avenue.

Q. What train do you take in the morning?

A. 8:11.

Q. From Lowerre?

A. Yes, sir.

Q. How long does it take you? And then where do you transfer?

A. At University Heights.

Q. How long does it take you using that route from your residence to your place of business?

A. 45 minutes.

Q. When you come from your place of business to your residence, do you use the same route?

A. Just about the same.

Q. About the same?

[fol. 450] A. Yes, sir.

Q. Where do you transfer to the Yonkers Branch?

A. Coming up at night?

Q. Yes.

A. High bridge.

Q. Have you ever traveled from your place of business to your residence taking the subway and the surface car?

A. I have, yes.

Q. And how does that running time compare with the other?

A. Leaving the house and getting on the trolley car at Lawrence Street and Broadway, to my office used to take about an hour and twenty minutes.

Q. So there is a difference of 25 minutes in running time?

A. Absolutely, yes, sir.

Q. And coming from your office to your home, have you used the subway route?

A. Well, when I would work at night, and I couldn't make the train on the Getty Square Branch, I would take the subway home.

Q. And the subway and the surface car.

A. Yes, sir.

Q. And you wouldn't have to take the bus at all?

A. No, sir.

Q. And coming up that way how did you find your running time? What did it amount to?

[fol. 451] A. Well, it was over an hour.

Q. Was it faster coming up that way or just going down that way?

A. Well, in the morning when I would have occasion, when I wasn't traveling, like during the depression, I would take the subway that time. It was longer in the morning, because of certain delays which made it so. I took the shuttle over and come up from there to 42nd Street to the office.

Mr. Gray: You may inquire, Mr. McLean.

Cross-examination.

By Mr. McLean:

Q. Do you buy a commutation ticket regularly now, do you?

A. Absolutely.

Q. You are within about two blocks of Broadway, Saratoga?

A. No, I would say three.

Q. And how close to the line at the Park Hill bus or is the Park Hill bus operated on—I believe it is Radcliffe Street?

A. Yes, I think so. Two.

Q. How many blocks?

A. Two blocks.

Q. Two blocks from your home, you can get to the alternate means of transportation here?

A. If I were to take the bus, sure.

Mr. McLean: That is all.

[fol. 452] Mr. Gray: Thank you.

(Witness excused.)

Mr. Gray: I think that is sufficient, Mr. Examiner.

BENJAMIN FRANKLIN BARNES, M. D., was sworn, and testified as follows:

Direct examination.

By Mr. McAneny:

Q. Where do you live, please?

A. 2 Halcyon Place, Yonkers, New York.

Q. Are you the director of Civilian Protection of the City of Yonkers acting under Chapter 544 of the Laws of 1942?

A. Yes, sir.

Q. And is it part of your duties as director of civilian protection to familiarize yourself with all transportation lines and means of transportation for the carrying on of civilian population in case of an emergency?

A. Yes.

Q. Are you familiar with the Getty Square Branch of the Putnam Division?

A. Yes, sir.

Q. Have you taken that branch into consideration as a part of the transportation system that might be called upon in such an emergency?

A. Yes, sir.

Q. How would that line be useful?

A. We had the courtesy of New York Central Railroad on this, officials come up and spoke to us. A very fine [fol. 453] gentleman.

Mr. McLean: You are referring to Mr. Vorhees?

The Witness: Yes, sir.

By Mr. McAneny:

Q. Go ahead.

A. We discussed quite fully with one of the counsel and before the counsel with regards to the railroad. In con-

sideration of the war production desire for steel for the war effort compared to the line carrying people from Yonkers to New York. My consideration on the whole subject depended mainly on the war effort. Now, my position in this matter is this: We must have lines that we can use for supplies both in and out of Yonkers and especially in this section. We also must realize that there was evacuation possibilities. Now, these possibilities may be remote. And they may take place tonight. If the New York Central Lines were put out of business along the Hudson River, we have the Putnam Division that goes down to Van Cortland Park and then it goes up along the Dunwoody Section up that and meets the Harlem and Chatham through Pawling and Brewster.

Q. Pawling, New York?

A. Yes.

Q. If we can evacuate our citizens through that line that gives us one place of taking them out?

A. Yes, because our center of population is along the [fol. 454] river and that part of Yonkers that lies in the close vicinity. I realize the Dunwoody vicinity has the Dunwoody station there, but that would take care of the evacuation, too. So I am considering the evacuation and bringing in of supplies and sending out of material from these defense areas through the defense areas, and also the civilians. And I firmly believe from the standpoint of protective service of the OCD and OCP that I believe that the Putnam should be left there for war purpose which are greater than the amount of steel that the Government would get out of it. And that is my standpoint on the subject. As far as the other party, as far as commuters in the paralleling lines, I realize the paralleling lines are there. I realize a little hardship would be put on people in that vicinity of going to their nearest points of lines to take them out of Yonkers, and commuting for business. But I believe that the taking out of that line during the war time would be bad. And that is my personal belief. I am not an expert, no specialist. That is just how I feel.

Q. But you are the director of Civilian Protection?

A. That is all.

Mr. McAneny: That is all.

Cross-examination.

By Mr. McLean:

Q. You think for the possibly protection for the city of Yonkers, that these 2,000 tons of steel that can be used in [fol. 455] the war effort should be kept in this line until after the war, at least?

A. I do, sir.

Q. Isn't it true, Dr. Barnes, that the big problem confronting these communities north of New York is that if there is a bombing of New York or some serious catastrophe there that people would be moving northward, and the effort is to speed them in a northerly direction?

A. That is right, sir.

Q. And this line leads in a southerly direction for a distance of three miles or more, before you can get any northern connection on the Putnam Line, is that right?

A. That is right. But it is there.

Q. It provides no direct access to the northerly direction?

A. I disagree.

Q. No direct access?

A. I disagree, not as a crow flies.

Q. I am using the word "direct."

A. I say if we got this line right here, we got the siding right here that we can knock the rails right down. We are diving cars around there. We can drop those fences out of there, and we are all set.

Q. You say that this is your idea, your are not suggesting that the War Department or the officials of the United States Government agree with you, are you?

[fol. 456] A. I don't expect anything. I just say how I feel. They are the bosses after all is said and done, and they will do what they want to. I say my little piece and that is all I can say.

Q. You have done it very well.

Redirect examination.

By Mr. McAneny:

Q. You are also Mayor of the City of Yonkers?

A. Yes, sir.

By Mr. McLean:

Q. You are not a commuter on this line, are you?

A. No, I am not, sir.

Exam. Schutrumpf: All right, you are excused.

(Witness excused.)

(Whereupon a short recess was taken.)

Exam. Schutrumpf: Let us proceed, please. Call your witness, Mr. Garrity.

RICHARD MARSARI, was sworn, and testified as follows:

Direct examination.

By Mr. Garrity:

The Witness: 31 Radford Street.

Q. You live at 31 Radford Street, Mr. Marsari?

A. Yes, I do.

Q. And you are a commuter on the Getty Square Branch [fol. 457] of the Putnam Division?

A. I am.

Q. How long have you been commuting on that line?

A. About six months.

Q. And at what—what station do you use?

A. Lowerre?

Q. Where do you go in the morning when you go to New York?

A. I take the Putnam Division down to High Bridge, and from High Bridge I take the main line down to Grand Central Station, and from Grand Central I go to Brooklyn Navy Yard.

Q. You are a war industry worker?

A. Construction work, yes, sir.

Q. How long have you lived in Yonkers?

A. I have lived in Yonkers about 23 years.

Q. Is it because of your new position in the Navy Yard that you have occasion to use the Putnam Division?

A. Yes, sir.

Q. Have you used it over other times, at other times?

A. I have not, no, but others in my family have, sir.

Q. As commuters?

A. Yes, sir.

Q. How many in your family use it commuting back and forth?

A. My father uses it regularly and my mother occasionally.

Q. And to your knowledge how many years has your father used it commuting?

[fol. 458] A. About 20 years.

Q. Are you in favor of the discontinuance of this line?

A. No, I am not, sir.

Mr. Garrity: That is all.

By Mr. Gray:

Q. Your address is east or west of Broadway?

A. East of Broadway, sir.

Cross-examination.

By Mr. McLean:

Q. The Park Hill Bus Line goes right by your house, doesn't it?

A. Yes, sir.

Mr. McLean: No further questions.

By Mr. Gray:

Q. You take the bus from Ludlow at all?

A. I have used it only Saturday afternoons occasionally. I cannot take it in the mornings, because I wouldn't be able to make any connection. The bus that I could get in the morning that would take me there, take me to the Ludlow station, but it would arrive about five minutes too late to get the train. In order to get a suitable bus, I would probably have to start perhaps a half hour earlier.

Mr. Gray: That is all.

By Mr. McLean:

Q. What train do you want to take out of Ludlow?

A. The train that reaches High Bridge at 7:15, I believe.

Q. That would be seven o'clock at Ludlow?

A. Yes, sir.

[fol. 459] Q. You could get a bus that would arrive at 6:53 and have a seven minute wait for your seven o'clock train?

A. 6:53?

Q. Yes.

A. When does—I don't know when that reaches Radford Street, where I live. The only one that I could get about the same time that I take the Putnam Division down, which passes my house at the same time, I leave for the Putnam Division would get—would not get there at 6:53, that would be a later bus.

Q. The only thing I was calling your attention to is that the bus schedule introduced in evidence has a bus on this line arriving at Ludlow Station at 6:53, which is seven minutes before the seven o'clock train you speak of.

A. That would probably be an earlier bus than the one I could get starting at the same time I do now.

Q. Starting a few minutes earlier, you could get the other bus.

A. Yes, probably 15 minutes earlier.

By Mr. Garrity:

Q. What time does the train go that you take in the morning?

A. 6:55.

Q. What is the bus headway that you get in the morning?

A. I don't know. All I know is there is one that leaves just as I leave the house for my train.

[fol. 460] Mr. Garrity: That is all.

(Witness excused.)

MAX ABRAHAMIS was sworn, and testified as follows:

Direct examination.

The Witness: 34 Loudown Street.

By Mr. Garrity:

Q. Your address?

A. 34 Loudown Street.

Q. How long have you lived in Yonkers?

A. About 58 years.

Q. And how long have you lived down on Loudown Street?

A. I have lived down there about ten years, but I built the house about 15 years ago. And I have lived in that section for the last 25 years.

Q. Do you own property in that section?

A. I do. I own the building at 34 Loudown Street, and some vacant land around the neighborhood.

Q. Is that an apartment house that you own in that section?

A. Yes, sir.

Q. Have you on occasion had to rent your apartments to tenants?

A. Oh, yes.

Q. And was one of the advantages that you had to offer the fact that it is near the Putnam Division?

A. That is right.

[fol. 461] Q. Will you tell the Commission just what your experience has been in reference to obtaining tenants due to the convenience?

Exam. Schutrumpf: You have not mentioned the station yet.

The Witness: I am right near Lowerre Station, as I am to the Caryl Station at the present time.

Mr. McLean: Almost half way between?

The Witness: Almost half way, yes. And I am in the real estate business, and I have an office in the house but my son has an office in the Park Building right here, and I am there most all the time. So after hearing what Dr. Barnes had to say, those are the only two fireproof buildings in the City of Yonkers. In case of air raid, and you are going to have air raid shelters, that would be the easiest way to get up to the First National Building, and the Park Building, would be the Putnam Railroad. I don't ride on the Putnam Railroad for the simple reason, not because it is convenient—it is not convenient for one reason. I saw that railroad from the beginning. I cannot see for the love of me if it is run right and it is run every five or ten minutes from every station. Instead of talking about commuting from Caryl down to New York, I would say just the reverse from Caryl station to Yonkers. Now, I think

they could collect barrels of nickles by charging a nickel [fol. 462] from any station in Yonkers to the City of Yonkers in the city limits, alone.

By Mr. Garrity:

Q. Have you used the railroad from Caryl up to Getty Square?

A. Very seldom for that one reason. You have to wait so long for a train, and you have to pay so much more fare, but if they run a reasonable—if they run a train often enough and they charged say five cents fare from the city limits, why it would be handy to get on the railroad, and I would come right in the backyard.

Q. Do you know what the charge is from Caryl Station to Getty Square?

A. I just heard it was ten cents.

Q. You can get on the trolley car, if you walk over five or six blocks for a nickel?

A. Yes, sir.

Q. At no time, to your knowledge have they ever reduced that fare to compete with the other lines?

A. I just found out why they want to eliminate that railroad. They want the commuters in that neighborhood to go all around the mulberry bush over to Ludlow Station. That is what they are trying to get at. Unfortunately they own that same railroad. They don't want to go on competing with themselves. They are losing money. Why are they losing money on that railroad? Because they [fol. 463] don't reduce the rates in rates in the City of Yonkers alone. Some people in Getty Square, those people want to pay taxes, would just go down to Caryl Avenue instead of going up Nodine Hill and all around for a nickel, they would come up from Lowerre Station. If I owned that railroad, I would run one.

Exam. Schutrumpf: How would you like to buy it for the junk value?

The Witness: If I had the money. If I had the money I would make it pay; between Newark and New York City, the tube, there is only standing room. You cannot even get a seat. Here you are in Yonkers, everybody is laughing at it, because your transportation is so bad. And another thing, they want to compel us to go on McLean Avenue Line. McLean Avenue Line. I may be out of order. You get on

the Broadway Line at McLean Avenue from the subway for a nickel, and in our neighborhood you got to pay two fares to get to the other side.

Here they want to compel people—people come up and say here, "I cannot live in your house. I have to waste a lot of time in case of rain, waiting for buses and waiting for trolleys, and it is too far away for transportation." And here I have to pay two fares.

By Mr. Garrity:

Q. Not so fast, Mr. Abrahams. He has got to take it.

A. That is as much as I have to say.

[fol. 464] My opinion is if the railroad was run efficiently on the style of the tube between New York and Newark, why we would have good transportation and the railroad company would make money and the city would benefit, and in case of an air raid we could all go to Lowerre Station and rush up to these two buildings here. They are even talking of using a air raid shelter up on these rocks.

Mr. Garrity: Thank you, Mr. Abrahams.

Cross-examination.

By Mr. McLean:

Q. You say you would like us to be run on the style of the Hudson and Manhattan, between New York and Newark?

A. I mean the Hudson tubes.

Q. Hudson Tubes, yes. And you would like us to incur the same deficit that that line incurs?

A. I am not acquainted with their deficit.

Exam. Schutrumpf: I don't see any use in that.

The Witness: I cannot see how they are losing money with so many people waiting for seats there.

Exam. Schutrumpf: That is all.

(Witness excused.)

WILLIAM A. FARRELL was sworn, and testified as follows:

Direct examination.

By Mr. Garrity:

Q. 97 Caryl Avenue, is that your address?

[fol. 465] A. Yes, sir.

Q. Mr. Farrell, are you a commuter on the Getty Square Putnam Division Line?

A. Well, I am not a commuter. I am a casual rider. I would never get the value of a commutation ticket on account of lost rides during the month.

Q. How many years have you been using the Putnam?

A. 21 years.

Exam. Schutrumpf: What station?

The Witness: Caryl Avenue.

By Mr. Garrity:

Q. What train do you take in the morning, Mr. Farrell?

A. I take—I have no stated time, or no stated train. I sometimes take the five minutes of seven and sometimes take the 8:41. I am never in Yonkers after that hour.

Q. Where do you go in the morning, Mr. Farrell, in New York?

A. If I go straight downtown, I go to Park Row, opposite City Hall and take the 6:55 and get down there at 7:50, Pulitzer Building.

Q. In coming home are you able to make connections that are convenient for you on the Putnam?

A. No, sir.

Q. Do you have to use other means of transportation to get home?

A. Well, the last train out of Grand Central that would [fol. 466] permit me to have transit home, poor transit home, it requires three changes and maybe 13 or 14 flights of stairs, would be the subway to Grand Central, and then you walk from 42nd and 4th Avenue to practically 45th Street, and Madison Avenue, before you get on the Central train. You get off at High Bridge, if you make the train. Up two flights of stairs, across a platform and down two more, and then you get the train from High Bridge to Caryl, and then up two more flights of stairs. That brings me home, if I make the train, about five or ten minutes of seven.

Q. Is that the last train in the evening that they run?

A. I don't think they run any after that. I never made any effort—they did at one time run a great number of them. They used to run them as late as 11.28 p. m. That would bring me home at 12 o'clock. You cannot go down town and live in Yonkers any more.

Q. I take it you are not in favor of the abandonment of this present line?

A. I think -ot. I might say that I have lived in the one house in the corner of Caryl and Van Cortlandt Park since the building was built in 1921. That is 21 years.

Q. That is an apartment house?

A. That is an apartment house, myself and partner built that house 21 years ago, and for 12 and 13 years we [fol. 467] suffered from the smoke and cinders, noise, of course, and we could still rent apartments there. And when the electrical installation was made, it was improved. But in different periods of time, why they have reduced the number of trains so that it is very inconvenient. I probably have about five people living in that house now that used the train at different times. The men there they are on time. The women they all have to rush for a train, but they have a very fine grade of help on that road, and they, as a rule wait for the women who are late in making the train. I have heard, sitting back there, I am very happy to say it. I don't see—I never met a more friendly bunch of railroad men who run those trains from the motormen and brakemen, and the women attendant at the station. The cars are clean and comfortable. There is not enough of them at any time. I was going to say I lived in that building for 21 years, and I am right on the corner. I have a clear vision of everything east and south and west. And this past few years, since the installation of the bus, it is a great advantage, it is a great help, but no man, I don't think there is any man that is a patron of that that lives on Park Hill that takes it and pays his fare with any degree of certainty that he is going to make his connection at Ludlow. Only as recently as yesterday morning I got on the bus with the expectation of making the 8:04 at Ludlow, and the [fol. 468] motorman of the bus, his engine had become overheated and he had to run them in the garage and feed it with water. With other men on the bus at the same time, lawyers, court cases, made a verdict much against them. And the people who use the bus to get down, the major portion of the people who use the bus to get downtown come up from the north end of Yonkers and they take the bus to Caryl Avenue and Broadway and they can make a connection there with the surface road. I don't think that the bus brings them many customers to the Central Railroad.

Q. Have you anything else that you wish to offer?

A. I suppose I could rave and rant all night, if you wanted to hear me. I might be able to laugh. I know I

won't make you cry. I know the particular block that I live on.

Mr. McAneny. That covers it.

The Witness: It is that block—it is at least three-quarters of a mile around. If a man lives up the street or any place p—in my house she has to walk over three or four hills to get the service. If there was service frequently during the day, the Central would profit by it to the extent that they would get many more riders, whether they paid cash fares or commutations. But I think they would get many more riders.

Mr. Garrity: Thank you, sir.

(Witness excused.)

[fol. 469] EUNICE G. MERRITT was sworn, and testified as follows:

Direct examination.

By Mr. Garrity:

Q. You live at 173 Saratoga Avenue, Miss Merritt?

A. That is right.

Q. How many years have you been a commuter on the Putnam?

A. Five years on Putnam. 9 years to Grand Central Station, and about 9 years I commuted from Caryl Station to Getty Square when I worked in Yonkers.

Q. Now many members of your family use the Putnam for commutation purposes?

A. Right now?

Q. Yes.

A. Well, there is one brother and myself live home, and my brother previously testified, who is married and lives on Boulder Place. Before that, there were two more brothers who used it until they married and moved away. They also used to to to college and go down to Grand Central to business.

Q. Are you in favor of the discontinuance of this line?

A. No, I am not.

Q. Do you feel that it will seriously affect your convenience in getting back and forth between Yonkers and New York?

A. Very much affect my convenience, and also the one brother that lives home.

[fol. 470] Mr. Garrity: That is all.

Mr. McLean: Nothing.

Exam. Schutrumpf: You are excused.

(Witness excused.)

DONALD B. JOHNSON was sworn, and testified as follows:

Direct examination.

By Mr. Garrity:

Q. You live where?

A. 122 Caryl Avenue.

Q. You are a commuter on the Putnam Division, are you not, Mr. Johnson?

A. I am.

Q. And have you a particular reason why it is necessary for you to use the Putnam Division?

A. One very particular one. I am allergic to dust, and when I use the Lincoln Branch of the—the dust or the steam engine or the cinders and silt, or when I use the subway, they effect me very much.

Q. And it is necessary?

A. It causes sinus attacks.

Q. You commute back and forth between New York every day?

A. I do.

Q. And you use the Putnam Division because of healthful reasons?

A. That is right, and because of the convenience. It is [fol. 471] only a minute away from the apartment.

Q. They do run clean trains, do they not?

A. No, just clean enough.

Q. For you to use the subway, it would be a distinct discomfort for you?

A. Not only that, it would be a distinct expense.

Q. You mean doctor expense?

A. That is right, plus time off from work.

Q. How long have you been using the Putnam?

A. A year, and two months.

Q. You are against the discontinuance?

A. I am.

Mr. Garrity: That is all.

Mr. McLean: Nothing for me.

Exam. Schutrumpf: Witness excused.

(Witness excused.)

Exam. Schutrumpf: Anything further?

Mr. Garrity: Nothing further.

Exam. Schutrumpf: Protestants rest?

Mr. Gray: We rest.

Mr. Garrity: We rest.

Exam. Schutrumpf: Do you want any briefs?

Mr. McLean: I am not interested in filing a brief. I think we covered the case very fully. I see no reason for a brief.

[fol. 472] Exam. Schutrumpf: Are you familiar with the Commission's procedure?

Mr. McAneny: In the commutation case we were filing briefs.

Exam. Schutrumpf: There are two procedures. One is a proposed report where there is no brief, and the other, if there is a final report, and the parties insist, and desire briefs, then there will be no Examiner's report. We will handle this as a proposed report procedure with no briefs. Examiners proposed report will be served on the parties I filed exceptions and reply to exceptions according to the rules of practice. That will eliminate briefs. No briefs now.

Mr. Garrity: Will you serve us then with a copy?

Exam. Schutrumpf: The Commission will serve a copy of the report of all parties who have entered their appearances in this proceeding as counsel.

Mr. Gray: You follow the Court of Claims procedure?

Exam. Schutrumpf: Off the record.

(Discussion off the record.)

Exam. Schutrumpf: If there is nothing further the hearing is closed.

(Whereupon at 10:00 p. m., the hearing was closed.)

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[fol. 472a]

EXHIBIT No. 2 BEFORE I. C. C. DOCKET No. F. D. 13914

Effective November 1, 1943		YONKERS BRANCH—PUTNAM DIVISION	
WEEK DAY TRAINS (No Sunday Service) NEW YORK TO YONKERS			
Miles	Station	200	213
	Putnam Division		
	to New York (G.C. Term.)	See note	See note
	to New York (125th Street)	See note	See note
	to High Bridge	See note	See note
	Putnam Division		
	to Red Hook Avenue	See note	See note
	to High Bridge (West 189th St.)	See note	See note
	to Morris Heights (West 177th St.)	See note	See note
	to University Heights (West 207th St.)	See note	See note
	to Kings Bridge (West 230th St.)	See note	See note
	to Van Cortlandt (West 242nd St.)	See note	See note
	to Caryl	See note	See note
	to Lowville	See note	See note
	to Park Hill	See note	See note
	to Yonkers (Gerty Square)	See note	See note
WEEK DAY TRAINS (No Sunday Service) YONKERS TO NEW YORK			
	Station	212	218
	Putnam Division		
	to Yonkers (Gerty Square)	See note	See note
	to Park Hill	See note	See note
	to Lowville	See note	See note
	to Caryl	See note	See note
	to Van Cortlandt (West 242nd St.)	See note	See note
	to Kings Bridge (West 230th St.)	See note	See note
	to University Heights (West 207th St.)	See note	See note
	to Morris Heights (West 177th St.)	See note	See note
	to High Bridge (West 189th St.)	See note	See note
	to Red Hook Avenue	See note	See note
	Putnam Division		
	to High Bridge	See note	See note
	to New York (125th Street)	See note	See note
	to New York (G.C. Term.)	See note	See note



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Buy Tickets before boarding trains and avoid payment of extra charge.

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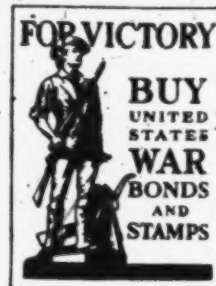
Lost Articles—When articles are lost on trains, or left in waiting rooms at stations, owners should apply at once to Agent at station where they leave the train.

E. E. PIERCE, Gen. Pass. Agent, 466 Lexington Ave., N. Y. City.

A. L. MILLER, Asst. Gen. Pass. Agent, 466 Lexington Ave., N. Y. City.

J. M. BREEN, Gen. Freight Agent, 466 Lexington Ave., N. Y. City.

E. L. GOLDEN, Supt. Putnam Division, Grand Cent. Term., N. Y. City.



11-1-42-4CM

Printed in U. S. A.

EFFECTIVE NOVEMBER 1, 1942

New York Central Yonkers Branch

Putnam Division Time Tables

Sedgwick Avenue
Van Cortlandt Park
Caryl
Lowerre
Park Hill
Yonkers (Getty Square)
and Intermediate Stations



FORM 115

[fol. 475]

EXHIBIT NO. 5 BEFORE I. C. C.
FINANCE DOCKET NO. 13914—WITNESS VOORHEES
New York Central Railroad Company
Yonkers Branch
Trains and Revenue Passengers

23-109

	Eastward					Westward					Total				
Date	No. Trains	Reg- ular	Commu- tation	Cash	Total	No. Trains	Reg- ular	Commu- tation	Cash	Total	No. Trains	Reg- ular	Commu- tation	Cash	Total
5-27-1941	17	117	471	89	677	17	91	470	64	625	34	208	941	153	1302
5-28-1941	17	116	461	67	644	17	89	445	65	599	34	205	906	132	1243
Average Daily	17	117	466	78	661	17	90	458	64	612	34	207	924	142	1273
5-26-1942	17	134	458	72	664	17	78	460	107	645	34	212	918	179	1309
5-27-1942	17	116	465	76	657	17	80	441	89	610	34	196	906	165	1267
Average Daily	17	125	461	74	660	17	79	451	98	628	34	204	912	172	1288
6-16-1942	17	125	447	67	639	17	86	369	98	553	34	211	816	165	1192
6-17-1942	17	118	460	67	645	17	63	423	97	583	34	181	883	164	1228
Average Daily	17	121	453	67	642	17	75	396	98	568	34	196	849	165	1210
10-27-1942	17	105	478	87	670	17	63	419	93	575	34	168	897	180	1245
10-28-1942	17	123	429	65	617	17	63	447	101	611	34	186	876	166	1228
Average Daily	17	114	453	76	643	17	63	433	97	593	34	177	886	173	1236

Note—Based on Conductors' Reports to Auditor of Passenger Accounts.

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[fol. 476]

Yonkers Branch
Revenue Passengers—Wednesday, October 28, 1942, from Conductors' APA 104 Reports

Eastward						Westward					
Train No.	Time	Regular	Commu-tation	Cash	Total	Train No.	Time	Regular	Commu-tation	Cash	Total
212.....	6:51 AM	11	10	...	21	209.....	6:25 AM	...	1	3	4
216.....	7:15 "	12	39	...	51	213.....	6:49 "	...	2	...	2
218.....	7:33 "	13	58	1	72	215.....	7:13 "	3	...	4	7
220.....	7:43 "	21	99	2	122	219.....	7:39 "	15	5	5	25
222.....	8:07 "	39	121	12	172	223.....	8:32 "	8	4	16	28
224.....	8:41 "	7	30	3	40	225.....	9:03 "	1	2	1	4
226.....	9:06 "	4	13	3	20	227.....	9:47 "	2	6	1	9
228.....	9:24 "	8	26	2	36	241.....	12:38 PM	...	3	5	8
230.....	10:55 "	4	5	...	9	251.....	3:28 "	1	9	3	13
242.....	1:14 PM	2	2	...	4	255.....	4:32 "	2	33	15	50
254.....	4:00 "	...	4	12	16	257.....	4:59 "	1	14	12	27
258.....	5:02 "	1	1	7	9	259.....	5:23 "	9	103	9	121
260.....	5:22 "	...	1	7	8	261.....	5:42 "	7	56	4	67
262.....	5:45 "	...	4	6	10	265.....	5:58 "	3	77	5	85
264.....	6:03 "	...	1	5	6	267.....	6:12 "	5	58	8	71
270.....	6:50 "	1	7	4	12	269.....	6:22 "	3	32	6	41
272.....	7:08 "	...	8	1	9	271.....	6:41 "	3	42	4	49
Total E.....		123	429	65	617	Total W.....		63	447	101	611
Total W.....		63	447	101	611						
Total.....		186	876	166	1228						

[fol. 477]

Yonkers Branch
Revenue Passengers—Tuesday, October 27, 1942, from Conductors' APA 104 Reports

Eastward						Westward					
Train No.	Time	Regular	Commu-tation	Cash	Total	Train No.	Time	Regular	Commu-tation	Cash	Total
212.....	6:51 AM	6	14	1	21	209.....	6:25 AM	...	1	3	4
216.....	7:15 "	12	43	2	57	213.....	6:49 "	1	1	1	3
218.....	7:33 "	12	56	2	70	215.....	7:13 "	...	2	4	6
220.....	7:43 "	17	99	4	120	219.....	7:39 "	13	6	4	23
222.....	8:07 "	23	161	18	202	223.....	8:32 "	7	2	16	25
224.....	8:41 "	10	46	...	56	225.....	9:03 "	2	1	2	5
226.....	9:06 "	11	11	3	25	227.....	9:47 "	1	7	1	9
228.....	9:24 "	6	16	4	26	241.....	12:38 PM	1	4	2	7
230.....	10:55 "	6	2	2	10	251.....	3:28 "	2	10	5	17
242.....	1:14 PM	1	2	2	5	255.....	4:32 "	5	23	11	39
254.....	4:00 "	...	4	4	8	257.....	4:59 "	2	15	13	30
258.....	5:02 "	1	5	5	11	259.....	5:23 "	9	96	4	109
260.....	5:22 "	...	3	19	22	261.....	5:42 "	4	56	4	64
262.....	5:45 "	...	7	6	13	265.....	5:58 "	4	75	4	83
264.....	6:03 "	...	2	9	11	267.....	6:12 "	3	61	10	74
270.....	6:50 "	...	5	4	9	269.....	6:22 "	4	39	2	45
272.....	7:08 "	...	2	2	4	271.....	6:41 "	5	20	7	32
Total E.....		105	478	87	670	Total W.....		63	419	93	575
Total W.....		63	419	93	575						
Total.....		168	897	180	1245						

[fol. 478]

Yonkers Branch

Revenue Passengers—Wednesday, June 17, 1942, from Conductors' APA 104 Reports

Eastward						Westward					
Train No.	Time	Regular	Commu-tation	Cash	Total	Train No.	Time	Regular	Commu-tation	Cash	Total
212	6:51 AM	7	14	1	22	209	6:25 AM	1	1	2	4
216	7:15 "	13	16	2	31	213	6:49 "	1	1	1	3
218	7:33 "	17	51	6	74	215	7:13 "	2	2	1	5
220	7:43 "	20	100	4	124	219	7:39 "	6	2	5	13
222	8:07 "	27	174	5	206	223	8:32 "	2	3	15	20
224	8:41 "	12	43	5	60	225	9:03 "	4	1	6	11
226	9:06 "	4	11	1	16	227	9:47 "	2	4	1	7
228	9:24 "	7	10	2	19	241	12:38 PM		5		5
230	10:55 "	4	7	2	13	251	3:28 "	1	5	3	9
242	1:14 PM	6	4	3	13	255	4:32 "	3	22	7	32
254	4:00 "		8	3	11	257	4:59 "	3	8	21	32
258	5:02 "		7	12	19	259	5:23 "	12	84	8	104
260	5:22 "	1	1	4	6	261	5:42 "	5	86	14	107
262	5:45 "		6	2	8	265	5:58 "	8	81	7	96
264	6:03 "		2	11	13	267	6:12 "	6	57	4	67
270	6:50 "		1	1	2	269	6:22 "	3	33	3	39
272	7:08 "		5	3	8	271	6:41 "	3	28		31
Total E		118	460	67	645	Total W		63	423	97	583
Total W		63	423	97	583						
Total		181	883	164	1228						

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Yonkers Branch

Revenue Passengers—Tuesday, June 16, 1942, from Conductors' APA 104 Reports

Eastward						Westward					
Train No.	Time	Regular	Commu-tation	Cash	Total	Train No.	Time	Regular	Commu-tation	Cash	Total
212	6:51 AM	7	14	2	23	209	6:25 AM	1	1	1	3
216	7:15 "	14	12		26	213	6:49 "	1	1		2
218	7:33 "	12	51	3	66	215	7:13 "	4	2	4	10
220	7:43 "	20	100	3	123	219	7:39 "	4	1	7	12
222	8:07 "	29	181	8	218	223	8:32 "	8	5	13	26
224	8:41 "	12	30	1	43	225	9:03 "	2		5	7
226	9:06 "	5	16	1	22	227	9:47 "	3	4	2	9
228	9:24 "	8	13	1	22	241	12:38 PM		4		4
230	10:55 "	5	3	6	14	251	3:28 "	3	6	3	12
242	1:14 PM	11	2		13	255	4:32 "	4	17	8	29
254	4:00 "		7	4	11	257	4:59 "	5	8	20	33
258	5:02 "	1	7	10	18	259	5:23 "	11	61	4	76
260	5:22 "		1	9	10	261	5:42 "	3	82	10	95
262	5:45 "		4	5	9	265	5:58 "	11	69	6	86
264	6:03 "		1	7	8	267	6:12 "	13	45	12	70
270	6:50 "		1	2	3	269	6:22 "	9	30	1	40
272	7:08 "	1	4	5	10	271	6:41 "	4	33	2	39
Total E		125	447	67	639	Total W		86	369	98	553
Total W		86	369	98	553						
Total		211	816	165	1192						

[fol. 480]

Yonkers Branch

Revenue Passengers—Wednesday, May 27, 1942, from Conductors' APA-104 Reports

Eastward						Westward					
Train No.	Time	Regular	Commu-tation	Cash	Total	Train No.	Time	Regular	Commu-tation	Cash	Total
212.....	6:51 AM	9	14	2	25	209.....	6:25 AM	1	1	2	4
216.....	7:15 "	12	14	2	28	213.....	6:49 "	1			1
218.....	7:33 "	13	52	1	66	215.....	7:13 "	3	2	4	9
220.....	7:43 "	27	105	2	134	219.....	7:41 "	3	1	6	10
222.....	8:07 "	29	170	11	210	223.....	8:32 "	7	4	11	22
224.....	8:35 "	11	51	4	66	225.....	9:03 "	1	2	3	6
226.....	9:06 "	3	12	3	18	227.....	9:47 "	1	6	1	8
228.....	9:24 "	7	12		19	241.....	12:38 PM	1	2	2	5
230.....	10:55 "	4	8	3	15	251.....	3:28 "	2	8	3	13
242.....	1:16 PM		5	4	9	255.....	4:32 "	11	29	7	47
254.....	4:00 "		2	5	7	257.....	4:59 "	2	8	22	32
258.....	5:02 "		4	10	14	259.....	5:23 "	5	86	4	95
260.....	5:22 "		2	8	10	261.....	5:42 "	14	80	9	103
262.....	5:45 "		8	6	14	265.....	5:58 "	10	70	4	84
264.....	6:04 "		1	11	12	267.....	6:08 "	8	76	4	88
270.....	6:50 "		1	1	2	269.....	6:22 "	7	28	4	39
272.....	7:20 "	1	4	3	8	271.....	6:41 "	3	38	3	44
Total E.....		116	465	76	657	Total W.....		80	441	89	610
Total W.....		80	441	89	610						
Total.....		196	906	165	1267						

[fol. 481]

Yonkers Branch

Revenue Passengers—Tuesday, May 26, 1942, from Conductors' APA 104 Reports

Eastward						Westward					
Train No.	Time	Regular	Commu-tation	Cash	Total	Train No.	Time	Regular	Commu-tation	Cash	Total
212.....	6:51 AM	12	13	1	26	209.....	6:25 AM	2	1	1	4
216.....	7:15 "	13	15	3	31	213.....	6:49 "				
218.....	7:33 "	18	48	1	67	215.....	7:13 "	2	2	5	9
220.....	7:43 "	26	93	2	121	219.....	7:41 "	4	2	8	14
222.....	8:07 "	32	183	8	223	223.....	8:32 "	6	4	15	25
224.....	8:35 "	10	44	5	59	225.....	9:03 "	3	2	6	11
226.....	9:06 "	7	11	3	21	227.....	9:47 "	4	5	1	10
228.....	9:24 "	7	11	2	20	241.....	12:38 PM		7	2	9
230.....	10:55 "		7	1	8	251.....	3:28 "		12	2	14
242.....	1:16 PM	9	3	1	13	255.....	4:32 "	1	32	9	42
254.....	4:00 "		5	5	10	257.....	4:59 "	4	10	16	30
258.....	5:02 "		9	7	16	259.....	5:23 "	13	89	6	108
260.....	5:22 "		1	10	11	261.....	5:42 "	10	75	13	98
262.....	5:45 "		7	10	17	265.....	5:58 "	13	80	5	98
264.....	6:04 "		2	7	9	267.....	6:08 "	7	76	10	93
270.....	6:50 "		2	3	5	269.....	6:22 "	3	30	5	38
272.....	7:20 "		4	3	7	271.....	6:41 "	6	33	3	42
Total E.....		134	458	72	664	Total W.....		78	460	107	645
Total W.....		78	460	107	645						
Total.....		212	918	179	1309						

[fol. 482]

Yonkers Branch

Revenue Passengers—Wednesday, May 28, 1941, from Conductors' APA 104 Reports

Eastward						Westward					
Train No.	Time	Regular	Commu-tation	Cash	Total	Train No.	Time	Regular	Commu-tation	Cash	Total
212.....	5:51 AM	9	11	.....	20	209.....	5:27 AM	1	1	1	3
216.....	6:15 "	10	27	4	41	213.....	5:49 "	.....	4	.....	4
218.....	6:33 "	10	48	4	62	215.....	6:13 "	1	2	2	5
220.....	6:43 "	26	110	3	139	219.....	6:41 "	6	13	4	23
222.....	7:07 "	29	163	4	196	223.....	7:31 "	12	6	17	35
224.....	7:36 "	8	39	2	49	225.....	7:57 "	2	9	9	20
226.....	8:07 "	4	8	3	15	227.....	8:47 "	3	6	.....	9
228.....	8:23 "	5	22	1	28	241.....	11:38 "	4	2	4	10
230.....	9:55 "	4	10	3	17	251.....	2:28 PM	8	8	3	19
242.....	12:15 PM	3	4	2	9	255.....	3:32 "	3	11	6	20
254.....	3:00 "	4	2	3	9	257.....	3:55 "	2	18	4	24
258.....	4:02 "	1	5	4	10	259.....	4:23 "	8	102	3	113
260.....	4:20 "	2	4	8	14	261.....	4:39 "	14	67	1	82
262.....	4:47 "	.....	3	15	18	265.....	4:56 "	8	78	1	87
264.....	5:01 "	1	2	5	8	267.....	5:08 "	6	61	5	72
270.....	5:50 "	.....	.....	5	5	269.....	5:22 "	8	30	2	40
272.....	6:20 "	.....	3	1	4	271.....	5:39 "	3	27	3	33
Total E.....		116	461	67	644	Total W.....		89	445	65	599
Total W.....		89	445	65	599						
Total.....		205	906	132	1243						

Time shown is Eastern Standard Time, one hour slower than Daylight Saving Time.

[fol. 483]

Yonkers Branch

Revenue Passengers—Tuesday, May 27, 1941, from Conductors' APA 104 Reports

Eastward						Westward					
Train No.	Time	Regular	Commu-tation	Cash	Total	Train No.	Time	Regular	Commu-tation	Cash	Total
212.....	5:51 AM	8	12	.....	20	209.....	5:27 AM	.....	1	2	3
216.....	6:15 "	8	25	5	38	213.....	5:49 "	.....	2	.....	2
218.....	6:33 "	11	53	8	72	215.....	6:13 "	4	1	2	7
220.....	6:43 "	26	121	1	148	219.....	6:41 "	3	15	3	21
222.....	7:07 "	38	166	6	210	223.....	7:31 "	16	4	14	34
224.....	7:36 "	6	29	3	38	225.....	7:57 "	4	9	6	19
226.....	8:07 "	3	8	3	14	227.....	8:47 "	8	6	1	15
228.....	8:23 "	5	21	.....	26	241.....	11:38 "	2	4	.....	6
230.....	9:55 "	3	9	2	14	251.....	2:28 PM	4	16	3	23
242.....	12:15 PM	4	3	.....	7	255.....	3:32 "	2	10	5	17
254.....	3:00 "	3	3	5	11	257.....	3:55 "	2	15	4	21
258.....	4:02 "	.....	6	8	14	259.....	4:23 "	7	114	6	127
260.....	4:20 "	.....	2	10	12	261.....	4:39 "	13	68	4	85
262.....	4:47 "	.....	6	12	18	265.....	4:56 "	11	86	4	101
264.....	5:01 "	1	2	7	10	267.....	5:08 "	9	63	4	76
270.....	5:50 "	1	3	7	11	269.....	5:22 "	4	30	2	36
272.....	6:20 "	.....	2	12	14	271.....	5:39 "	2	26	4	32
Total E.....		117	471	89	677	Total W.....		91	470	64	625
Total W.....		91	470	64	625						
Total.....		208	941	153	1302						

Time shown is Eastern Standard Time, one hour slower than Daylight Saving Time.

EXHIBIT No. 6 BEFORE I. C. C.
DOCKET No. 13914—WITNESS: VOORHEES
The New York Central Railroad Company
One Way, Round Trip, Commutation, 12 and 26 Trip Fares, Also Optional Privileges

Between New York (Grand Central Terminal) and	O. W. Coach Fare	R. T. Coach Fare	12 Trip Fare	26 Trip Fare	Monthly Comm. Fare	46 Trip Monthly School Fare	Options
1. Putnam Div.—Yonkers Branch (via High Bridge)	(Note B)	(Note B)	(Note C)	(Note C)	(Note D)	(Note D)	
Caryl, Getty Sq. Br.	\$0.28	\$0.56	\$3.00	\$6.10	\$8.53	\$6.15	(2) Mt. St. Vincent, Wakefield (7) Lincoln
Lowerre, Getty Sq. Br.	33	66	3.15	6.10	8.53	6.15	(2) Mt. St. Vincent, Wakefield (3) Lincoln
Park Hill, Getty Sq. Br.	33	66	3.40	6.60	8.94	6.47	(1) Ludlow (2) Mt. Vernon
Getty Square, Getty Sq. Br.	33	66	3.60	7.03	9.29	6.74	(3) Lincoln (8) Yonkers (3) Dunwoodie (5) Fleetwood (6) Bronxville
2. Putnam Div.—Main Line (via High Bridge)							
Lincoln	33	66	3.15	6.10	8.53	6.15	(2) Mt. St. Vincent, Wakefield (3) Lowerre
3. Hudson Division	(Note A)	(Note A)	(Note C)	(Note C)	(Note D)	(Note D)	
Mt. St. Vincent	28	56	3.00	6.10	8.53	6.15	(2) Wakefield (5) Lowerre and Lincoln (6) Caryl
Ludlow	33	66	3.40	6.60	8.94	6.47	(1) Park Hill (2) Lincoln, Mt. Vernon
Yonkers	33	66	3.60	7.05	9.29	6.74	(2) Dunwoodie (4) Getty Square (5) Fleetwood (6) Bronxville

Note A—Fares are published in New York Central RR. Tariff No. 196—Third Issue, I. C. C. No. 5911, P. S. C. N. Y. No. 2743.
 Note B—Fares are published in New York Central RR. Tariff No. 341—First Issue, I. C. C. No. 7033, P. S. C. N. Y. No. 3339.
 Note C—Fares are published in New York Central RR. Tariff No. 321—First Issue, I. C. C. No. 5316, P. S. C. N. Y. No. 2436.
 Note D—Fares are published in New York Central RR. Tariff No. 69—Eighth Issue, I. C. C. No. 4289, P. S. C. N. Y. No. 1852.

- (1) Applies on all tickets except 46 Trip School tickets.
 (2) Applies on 12 trip, 26 trip and monthly commutation tickets.
 (3) Applies on 12 trip, 26 trip, 46 trip school and monthly commutation tickets.
 (4) Applies on one way, round trip and monthly commutation tickets.
 (5) Applies on monthly commutation and 26 trip tickets.

The New York Central Railroad Company
One Way, Round Trip and Commutation Fares

	Between 125th St.				Between The Bronx (138th St.)			
And	O. W. Coach Fare	R. T. Coach Fare	54 Trip Monthly Comm. Fare	46 Trip Monthly School Fare	O. W. Coach Fare	R. T. Coach Fare	54 Trip Monthly Comm. Fare	46 Trip Monthly School Fare
1. Putnam Div.—Yonkers Branch (via High Bridge)	(Note B)	(Note B)	(Note E)	(Note E)	(Note B)	(Note B)	(Note E)	(Note E)
Caryl, Getty Sq. Br.	\$0.22	\$0.44	\$6.49	\$4.90	\$0.22	\$0.44	\$6.00	\$4.51
Lowerre, Getty Sq. Br.	28	56	6.49	4.90	28	56	6.00	4.51
Park Hill, Getty Sq. Br.	28	56	6.99	5.28	28	56	6.49	4.90
Getty Square, Getty Sq. Br.	28	56	6.99	5.28	28	56	6.99	5.28
2. Putnam Div.—Main Line (via High Bridge)								
Lincoln	28	56	6.49	4.90	28	56	6.00	4.51
3. Hudson Division	(Note A)	(Note A)	(Note E)	(Note E)	(Note A)	(Note A)	(Note E)	(Note E)
Mt. St. Vincent	22	44	6.49	4.90	17	34	6.00	4.51
Ludlow	22	44	6.99	5.28	22	44	6.49	4.90
Yonkers	22	44	7.48	5.61	22	44	6.99	5.28

No optional privileges are available in connection with any of the above fares.

Note A—Fares are published in New York Central RR. Tariff No. 196—Third Issue, I. C. C. No. 5911, P. S. C. N. Y. No. 2743.

Note B—Fares are published in New York Central RR. Tariff No. 341—First Issue, I. C. C. No. 7033, P. S. C. N. Y. No. 3339.

Note E—Fares are published in New York Central RR. Tariff No. 75—Seventh Issue, I. C. C. No. 4360, P. S. C. N. Y. No. 1914.

New York, N. Y.
November 11, 1942

[fol. 486]

EXHIBIT NO. 7 BEFORE I. C. C.

Finance Docket No. 13914;

Exhibit No. 7

Witness Voorhees

Club Transportation Corp.,

Park Hill Schedule

A. M. Rush Hour

Arrive Ludlow Station	Leave Ludlow Station	Arrive Yonkers Station	Leave Yonkers Station
5:55 A. M.	6:00 A. M.	5:55 A. M.	6:00 A. M.
6:10	6:12	6:10	6:12
6:22	6:24	6:22	6:24
6:33	6:35	6:34	6:36
6:43	6:45	6:48	6:50
6:53	6:55	6:58	7:00
7:03	7:05	7:08	7:10
7:13	7:15	7:18	7:20
7:23	7:25	7:28	7:30
7:33	7:35	7:38	7:40
7:43	7:45	7:48	7:50
7:53	7:55	7:58	8:00
8:02	8:05	8:08	8:10
8:12	8:15	8:18	8:20
8:23	8:25	8:28	8:30
8:32	8:36	8:38	8:40
8:46	8:48	8:47	8:50
8:57	9:00	8:58	9:00

P. M. Rush Hour

Arrive Ludlow Station	Leave Ludlow Station	Arrive Yonkers Station	Leave Yonkers Station
4:03 P. M.	4:06 P. M.	4:30 P. M.	4:33 P. M.
4:14	4:17	4:41	4:44
4:25	4:28	4:52	4:55
4:36	4:39	5:03	5:06
4:47	4:50	5:14	5:17
4:58	5:01	5:25	5:28
5:09	5:12	5:36	5:39
5:20	5:23	5:47	5:50
5:31	5:34	5:58	6:01
5:41	5:45	6:09	6:12
5:53	5:56	6:22	6:24
6:04	6:07	6:34	6:36
6:15	6:18	6:46	6:48
6:26	6:29	6:58	7:00
6:37	6:40	7:10	7:12
6:48	6:51		
6:57	7:00		

[fol. 487]

Finance Docket No. 13914

Exhibit No.

Witness _____

Club Transportation Corp.

Nodine Hill Schedule

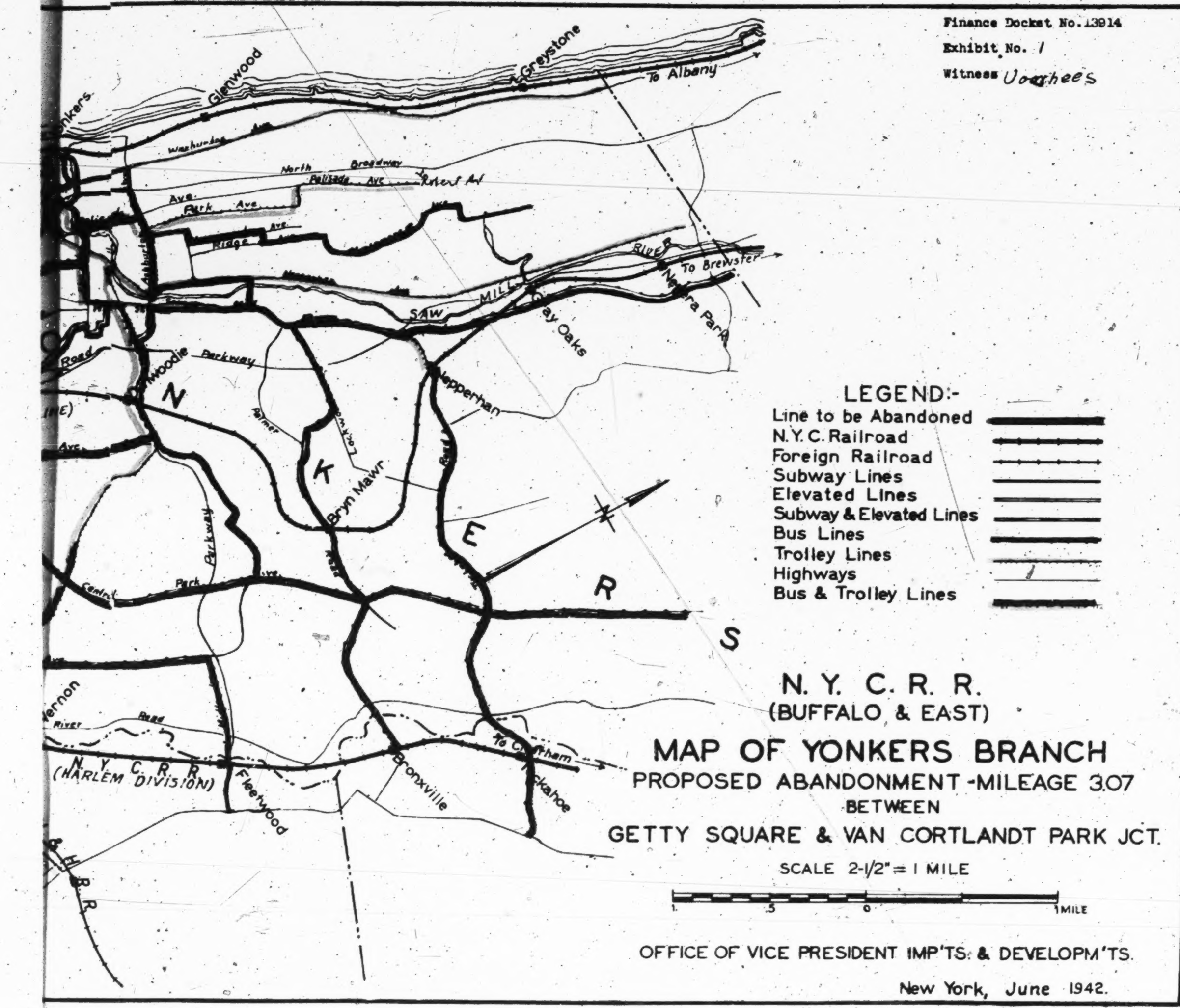
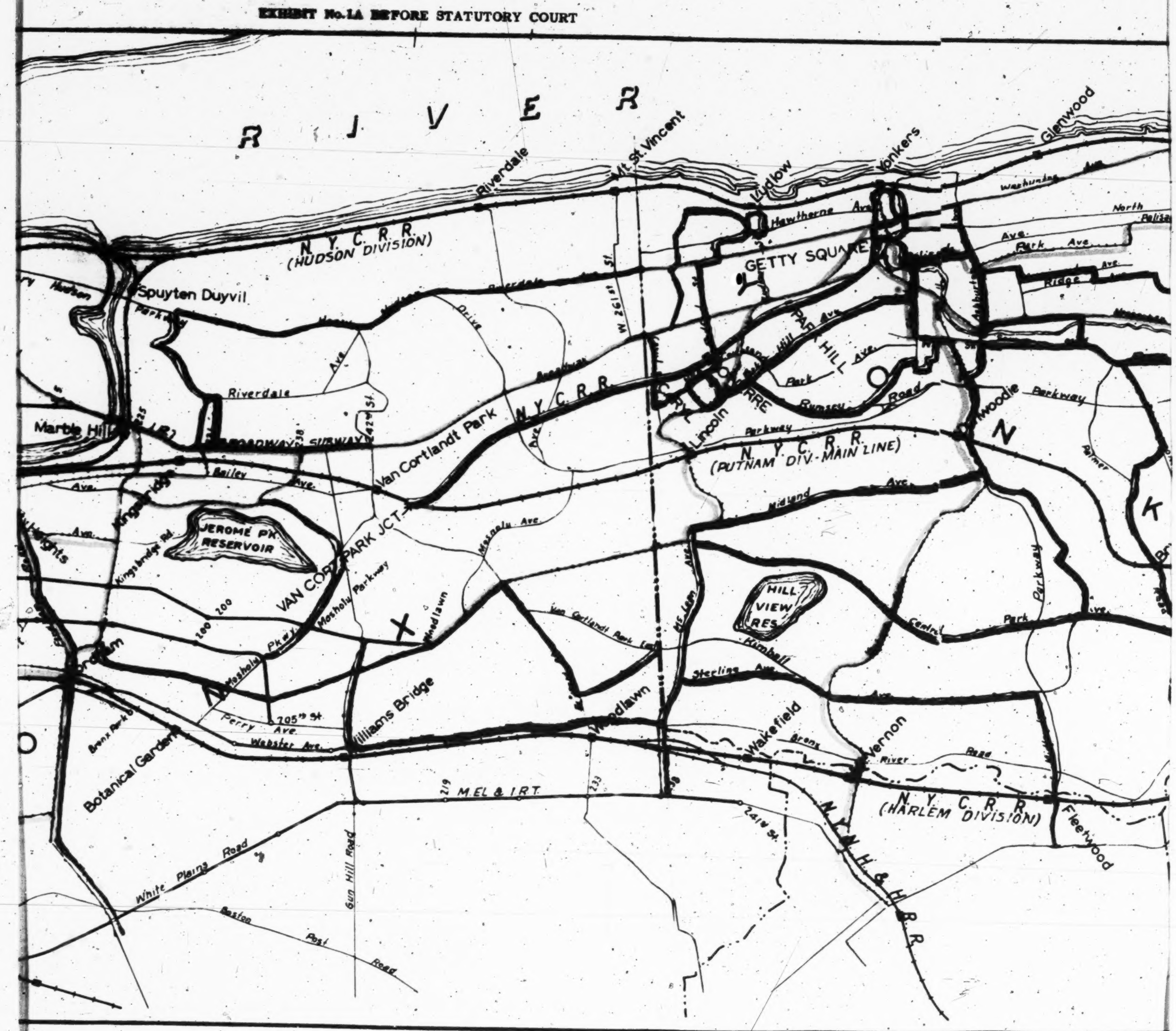
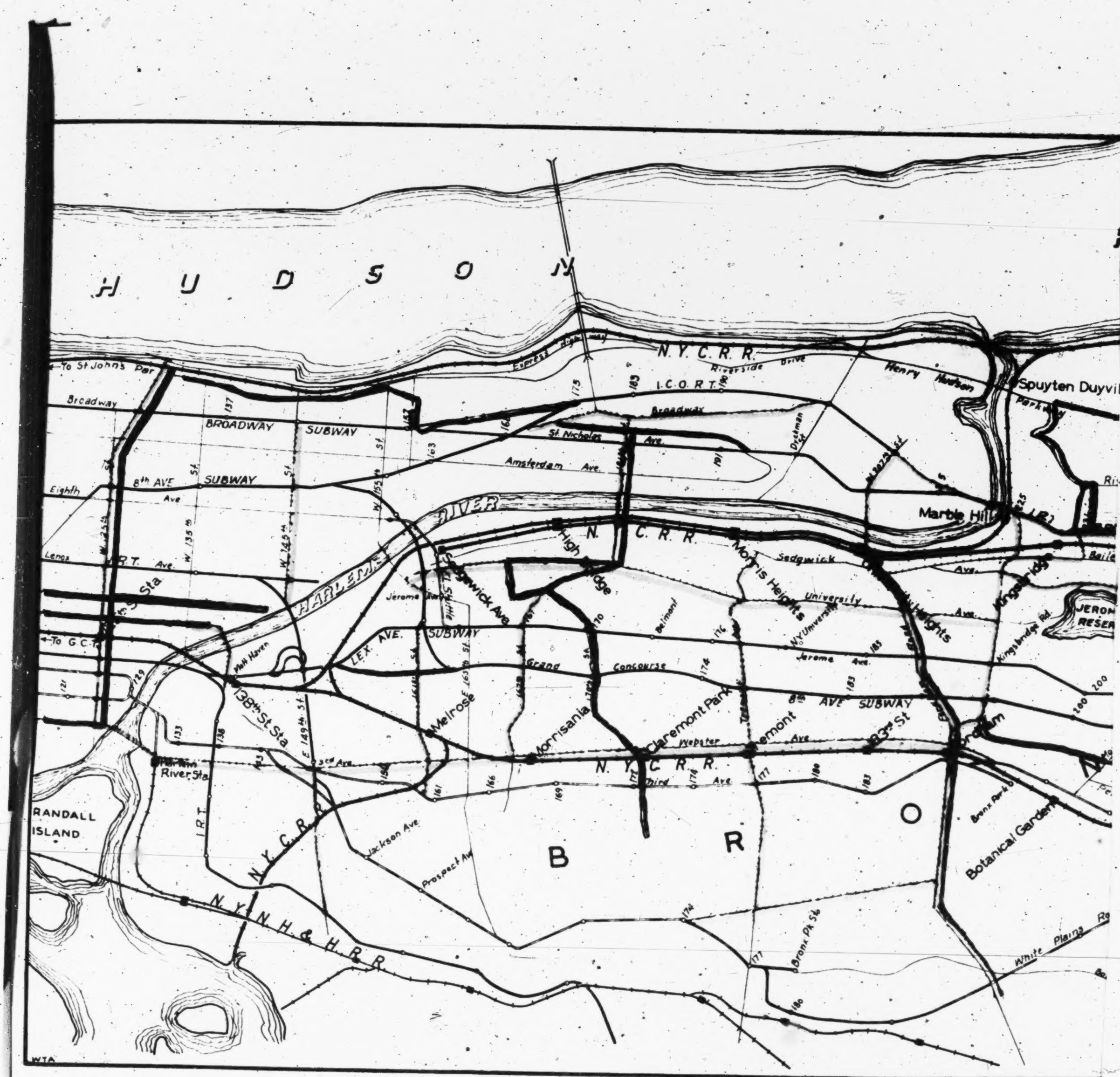
A. M. Rush Hour

Arrive Ludlow Station	Leave Ludlow Station	Arrive Yonkers Station	Leave Yonkers Station
5:55 A. M.	6:00 A. M.	5:55 A. M.	6:00 A. M.
6:10	6:12	6:10	6:12
6:22	6:24	6:22	6:24
6:34	6:36	6:34	6:36
6:46	6:48	6:46	6:48
6:58	7:00	6:58	7:00
7:10	7:12	7:10	7:12
7:22	7:24	7:22	7:24
7:34	7:36	7:34	7:36
7:45	7:48	7:46	7:48
7:57	8:00	7:58	8:00
8:09	8:12	8:10	8:12
8:22	8:24	8:22	8:24
8:33	8:36	8:34	8:36
8:45	8:48	8:46	8:48
8:57	9:00	8:58	9:00

P. M. Rush Hour

Arrive Ludlow Station	Leave Ludlow Station	Arrive Yonkers Station	Leave Yonkers Station
4:04 P. M.	4:07 P. M.	4:39 P. M.	4:42 P. M.
4:18	4:21	4:53	4:56
4:32	4:35	5:07	5:10
4:46	4:49	5:21	5:24
5:00	5:03	5:35	5:38
5:14	5:17	5:49	5:52
5:28	5:31	6:03	6:06
5:42	5:45	6:17	6:20
5:56	5:59	6:31	6:34
6:10	6:13	6:45	6:48
6:24	6:27	6:57	7:00
6:38	6:41	7:09	7:12
6:51	6:54		
7:05	7:08		
7:19	7:22		
7:33	7:36		

November 7, 1942.



[fol. 490] EXHIBIT NO. 2 BEFORE STATUTORY COURT

Before the Interstate Commerce Commission

Docket No. F. D. 13914

In the matter of the application of the New York Central Railroad Company for a certificate of public convenience and necessity permitting abandonment of the line of railroad extending from Van Cortlandt Park Junction, New York City, to Getty Square, New York.

Room 4224, I. C. C. Building,

Washington, D. C., Wednesday, March 3, 1943.

The above-entitled matter came on for oral argument before Division 4 at 10 o'clock A. M.

Present: Commissioners Porter (Presiding), Mahaffie, and Miller.

APPEARANCES:

Harold H. McLean, 466 Lexington Avenue, New York City, appearing for the New York Central Railroad Company, applicant.

Harry Hertzoff, Assistant Corporation Counsel, Municipal Building, New York, N. Y., appearing for Thomas D. Thacher, Corporation Counsel, City of New York.

Horace M. Gray, 42 Broadway, New York City, appearing for Committee of Yonkers Commuters.

[fols. 491-492] Paul L. Bleakley, City Hall, Yonkers, N. Y., appearing for the City of Yonkers.

J. G. Luhrsen, 10 Independence Avenue, Washington, D. C., appearing for Railway Labor Executives Association.

[fol. 493]

Proceedings

Commr. Porter: All right, gentlemen. Come to order.

The Commission by Division 4 will now hear argument in Finance Docket No. 13914, Application for abandonment by the New York Central Railroad Company.

Mr. McLean, you have thirty minutes.

Oral Argument of Mr. Harold H. McLean on Behalf of Applicants

Mr. McLean: If the Commission please, I have been allotted forty-five minutes. I should like to divide fifteen

minutes of that time with Br. Bleakley, Corporation Counsel for the City of Yonkers.

I anticipate your chief difficulty will be in connection with the financial situation. This line to be abandoned is just north of New York. It has a somewhat complicated commutation set-up connected with the City of New York subways. For that purpose, I am supplying maps that I think will be useful. These maps have been introduced in evidence in the case with the exception of the insert which I have attached to the longer map. The insert is supplied for the purpose of explaining the location of this line in connection with the other lines of the New York Central Railroad that serve New York City.

I shall refer first to the small insert. Perhaps if we start from Grand Central Terminal and work north on the small map, Grand Central Terminal working north, the [fol. 494] first junction is Mott Haven. Turning from that to the left there is a line that follows the Harlem River up to the Hudson River at a point marked Spuyten Duyvil. The line we are interested in is parallel to this line north of the Harlem River. It commences just parallel to it and extends north and is the middle line of the three extending north. That is the Putnam Division. Following up the Putnam Division a distance to a point marked Van Cortlandt Junction we get the beginning of this line which goes over to Getty Square. It is a line 3.1 miles long that is used only for the transportation of passengers.

Commissioner Porter: Is Getty Square in Yonkers?

Mr. McLean: Yes. And the city line is indicated by that change of color, New York City and the Bronx being in the darker yellow and Yonkers being a little beyond.

Turning to the map to which the small insert is attached, the line of the City of Yonkers in New York is about in the middle, the boundary line is about in the middle of the map. The word "River" taking the last "R", and right below it is Mt. St. Vincent, then that broken line is the city line between the two Cities. The line to be abandoned is marked in red on that map. You can see that a portion of it is in Yonkers and a portion is in the City of New York.

The line is electrified and the electrification extends starting at Getty Square following the line down to Van Cort-

landt Park Junction. Then it follows down past Kings Bridge which is a station on it, on the Putnam Division. [fol. 495] Then to University Heights, Morris Heights, High Bridge and Sedgwick Avenue.

The Putnam Division it is which extends north from Van Cortlandt Park Junction or to the right, is not electrified.

At the lines of the New York Central which enter into the picture as providing commutation service and some of it will take the place of the service south to be abandoned here is first the Hudson Division which follows along the River. The first station on the right of the map is Graystone, Glenwood, Yonkers, Ludlow, Mt. St. Vincent, etc. That line turns at Spuyten Duyvil and follows the Harlem River down past these stations, University Heights and Morris Heights, and High Bridge. Passengers who use this electrified line called the Yonkers Branch, they want to go to New York and use the New York Central Railroad, they transfer usually at High Bridge, and go from there to an overhead ramp, then down again to the High Bridge station and take Hudson Division trains which follow on the line over to that triangle there called Mott Haven Junction on the left of the map. Then to 138th Street, then across the bridge, the Harlem River, and down to Grand Central Station.

In addition there is another commutation line or lines of the New York Central, to the east it would be or toward the bottom of the map. That is called our Harlem Division. [fol. 496] Perhaps if we start from Mott Haven Junction or 113th Street at the Harlem River, the extreme left of the map, that line extends due north. The Hudson Division trains go to the west or the top of the map, the Harlem Division trains continue on a straight line up through New York City, and at the very edge of the City of Yonkers. At the middle of the map there is a point marked Hill View Reservoir. Right below that is Wakefield Station, Mt. Vernon, and those stations there. Actually that line crosses a very small portion of the City of Yonkers between Fleetwood and Bronxville. On the whole, however, it is outside of the City of Yonkers, and does not enter into the picture in this case as far as substitute service is concerned, except perhaps in the fantastic event there being a sudden necessity of people getting out of Yonkers due to war conditions, there might be some resort to the Harlem Division.

The principal stations on this line, that is the stations where most of the patronage is, what little there is, are the stations of Caryl and Lowerre. Caryl is about in the middle of the map. Just about in the middle of that red line that represents the line to — abandoned. It is spelled C-a-r-y-l. Lowerre is the next station. As I said, those two stations have by far the greatest proportion of the patronage.

The next station, Park Hill, there is very little patronage from that. Getty Square, which is the heart of the business district, is very close to Yonkers station on the Hudson [fol. 497] Division main line. Now the Hudson Division renders superior service to Yonkers and to Ludlow, to all the stations, largely because it has a great deal more patronage. It has a number of stations that are very important, extending north a distance of perhaps 50 or 60 miles.

The service on the Putnam Division, which is steam operated, does not compare by any means to the service on the Hudson Division.

Commissioner Miller: That Hudson Division is the main line?

Mr. McLean: Yes, that is the main line, the Chicago-New York line of the New York Central.

There are 17 trains a day operating each way on this line. I say trains, there is one four car train, one three car train, the balance of them are two car trains. They are what are called MU or Multiple Unit cars. Any number of them can be joined together, there is no engine. There is no freight that is being transported on the line. It is not equipped to transport freight. It is doubtful whether the bridges would hold a freight engine. There are no facilities for receiving freight and no cars that could handle freight. The people who live in this Caryl and Lowerre section—speaking of the traffic there are about 600 people a day that use this line going back and forth. That is its patronage for the day represents about 1200 people but considering both directions it would pack about 600 people. [fol. 498] Now in the event the line is abandoned, these people have a number of ways of getting to New York. Taking the area Caryl and Lowerre section, those people can get to the Ludlow Station by a bus line. There are two of them. Those green lines represent the route of the bus. Roughly speaking those lines are U shaped, beginning at

Yonkers, extending off at Yonkers Station on the Hudson Division, extending back through the country almost as far as the Putnam main line, then back to Ludlow again. One goes little further going through Caryl and back to Yonkers. There is a 5 cent fare on that line. The distance is, I think, a mile and three-tenths in one case and a mile and four-tenths in another. The President of the Bus Company appeared at the hearing. He testified they had two extra busses available which if put in shuttle service in his opinion would accommodate all the extra passengers. The chief trouble of course is in the rush hour. That is in the morning and about a half to three-quarters of an hour period when people go to the commutation trains, and the arrival time in New York City coincides with the time they should be at work. In that period there are about 350 people. Even if all of them come to the Ludlow station by means of these busses two extra busses during that time could doubtlessly accommodate the people.

Commissioner Mahaffie: Is there no way to get from say Caryl down to the end of the Broadway Subway?

Mr. McLean: Yes, there are two other ways the people [fol. 499] can get to New York. The other way, the most convenient way I think, the way that has taken most of our patronage in times past is by the Broadway Avenue trolley. Broadway parallels this line. It is the yellow line just immediately north. That line extends down to 242nd Street, which is the beginning of the Broadway Avenue Subway line. There is a five cent fare. There is no doubt that that line is available and there is plenty of room to accommodate the passengers.

Commissioner Mahaffie: There had been a five cent fare to the subway?

Mr. McLean: Yes, and five cent fare on that toll of ten cent fare. That subway connects with the main subways going down into Manhattan. The local Superintendent of the Street Car Company appeared at the hearing, testified there was sufficient space available in the cars. He had counts as to the number of passengers in the car and continued them at the line, at the New York City line, and stated that there was room for more passengers. I think he said he had some cars in reserve.

In addition to that there is another street car line that follows McLean Avenue. If I can pick it out here on the

map, just below the point marked Caryl and Lowerre there is a yellow line. In fact it crosses the red line, joins at Broadway. It crosses between Lowerre and Park Hill. Then in irregular fashion to the point marked Lincoln, which is a station on the Putnam Division. At that point Putnam Division trains could be boarded. Or continuing [fol. 500] on, the yellow line, it makes a break crossing the city line extending down as far as Woodlawn, which is the terminus of the Lexington Avenue subway. This goes down Jerome Avenue and finally goes under the river, goes underground, it is elevated at that point, goes underground about opposite the end of the Yonkers branch of Sedgwick Avenue, then continues down to Grand Central.

There is no disputing, I won't argue for the moment these alternate routes are as convenient as the existing routes these people have. It will take them a longer time to get to their work. It may not be as pleasant for them to transfer once or twice or to ride the street cars after they had been used to the expedited service on this line. But in view of their failure to patronize the line sufficient to make it pay, I don't think that is a controlling consideration here.

Commissioner Mahaffie: Your point is the Broadway Subway has taken a good deal of the patronage?

Mr. McLean: Yes, it has. It is rather difficult for us to know of course where the patronage has gone. In recent years some of it has gone to our Ludlow Station on our Hudson Division because of the inauguration of this bus service. The bus service has been here about 2 years. The people prefer to get on at Ludlow because they avoid a rather inconvenient transfer at High Bridge. High Bridge [fol. 501] is where they have to go up a stairway over an overhead bridge then down another stairway and wait for trains. Many of them prefer to go directly to Ludlow and get on the same train.

From our point of view we feel it is somewhat wasteful transportation to have to save a seat on these Hudson Division trains for the people that ride this branch because they can just as well come over to Ludlow and get the seat there without having to have the duplicate seat provided for them.

Commissioner Mahaffie: You mean you save seats for them?

Mr. McLean: Yes. There has been no complaint as to the patronage. I may say there is only one train that really counts. The one train in the morning, this four car train we speak of, makes the connection here and seats are usually available for them coming into the direction. Those passengers have just as good a chance to get a seat as any one else. They get on at Grand Central, when they get off that seat is vacated. As far as I am aware there has been no complaint as to lack of seats on the New York Central.

You Gentlemen heard the commutation fares. The 13 section case. You recall, I think, the question of seats not being provided was raised in connection with the Long Island, not in connection with the New York Central.

There is another circumstance that is rather important right now, we believe. That is that on the Harlem Division there are being used 15 standard coaches to provide service from certain points there. We haven't enough of [fol. 502] these M. U. cars to take care of them. That means that every night at Grand Central Station they must pick up 15 cars from some place or another and get them up to the point on the Harlem Division to make these two heavy commutation runs in the morning. There are 11 M. U. cars being used on this line. If we are permitted to abandon it while this emergency is before us we can release for use in any place on our system, or any place in the U. S. for that matter, the standard coaches that are being used on the Harlem Division. We think that is very important.

Getting now to the revenue involved, we have credited this line, that is its Yonkers branch, with all of the revenue which accrues on the New York Central. We have first allocated to the line, it is for the purpose of the record, on a mileage basis, the amount of revenue. But we have given the line credit for everything earned on the red line and on down to Sedgwick Avenue, and also on the balance going down to Grand Central Station. The revenue on the Hudson Division which is thus allocated to the line, represents about 62 per cent of the entire revenue accredited to the line. So there can be no question whatever as to the amount of revenue we have given to the line.

Then in computing expenses we have set up no expense for the transportation of the passengers on the Hudson

Division. That was partly on the theory that for the most [fol. 503] part they file into the Hudson Division trains just a few at a time but with respect to the two heavy train-, morning and night, there are approximately two car loads of people on the Hudson Division who get off there, their seats are no further used on the Hudson Division so there could have been some calculation made there but we haven't attempted to do that.

Our figure, or rather the examiners figure of \$56,941 annual loss is highly conservative because of the manner in which we have computed the revenues and have computed the expenses.

The maintenance cost has been computed on a conservative basis. We took averages over a period of 7 years. We left out the year 1939, I believe, because we already had some computations and we didn't want to duplicate them. We have used a figure of only \$16,000, \$16,400 per year and the actual maintenance for 1941 was \$23,000. These maintenance figures are actual averages of money spent on the branch, the patronage has been decreasing for a number of years. The line was electrified in 1926 at considerable expense in the hope of inducing increased patronage. There was some increased patronage for a time. I think 70 trains were operated instead of 34 now. That has fallen away. One thing that caused considerable drop of revenue is the abandonment of the 6th and 8th Avenue elevated lines in New York. These lines previously crossed the Harlem River at the very end of this line. That is now marked with shuttle. There is a very short line that connects. [fol. 504] Formerly there was an elevated line came down through the middle of the Bronx, crossed right in front of this line, then over the bridge and down into lower Manhattan. When that line was abandoned, they abandoned the two sections, one in 1936, the other in 1939, our traffic fell off very rapidly. Since that time there has not been enough traffic to support it. So that annual loss of \$56,000 hasn't been seriously disputed in this case.

Recently there has been an increase in patronage generally in the New York area and commutation generally, that is the Hudson and Harlem Divisions, our principal commutation lines, have shown increase in commutation revenue of 12 percent. This line over the same period showed increase of 2.89 percent. So it is not holding its own, even the stimulus to rail transportation because of

war conditions has not brought traffic back to this line. The street car patronage has increased approximately 25 percent according to the testimony. The bus line, speaking of the bus line that serves the Ludlow Station, that has increased about 15 percent. But this line is not holding its own. To us that is a sure indication that a line that can't show a normal, that is to say an average increase in traffic during a time like this, obviously will be even worse off when conditions return to normal after the war, whatever they may be.

How much time do I have?

[fol. 505] Commissioner Porter: You have about five minutes.

Mr. McLean: I think I will save that time for rebuttal. I was going to comment on the nature of the exceptions. I can do that best I think by replying to what was said by the protestants.

Commissioner Porter: Mr. Hertzoff.

Oral Argument of Mr. Harry Hertzoff

If the Commission pleases. I just want to summarize our position.

We file no exceptions. We agree with the report of the examiner. The number of passengers, as Mr. McLean has given, are about 600. It carries no freight; there is no night service. There is no Sunday service. There are only about 17 trains a day with the number of cars very small and 11 cars altogether in use. The traffic has dropped as shown by the testimony so that it is only 25 percent of what it was 12 years ago. Reasons Mr. McLean gave were probably as good as anybody could think of that our subways which run Broadway and to the end there probably are taking a lot of the traffic.

There are other adequate means of transportation both by the New York Central Hudson Division and the Putnam Division and the busses and trolleys that lead to our subway.

We are interested in this subject as the Commission well [fol. 506] knows. We are opposed to the increase in commutation rates. We feel that the loss in operation is substantial considering the short mileage that is involved.

As stated by Mr. McLean the cars can be used in other branches where they are more needed.

We believe that the examiners report should be approved and that the abandonment of the line be permitted.

I'd like—

Commissioner Mahaffie: Pardon me, has the city any project to extend the Broadway subway further than 142nd Street.

Mr. Hertzoff: You raised the question that really brought me here. I wanted to wait and see what the protestants had to say about it. We are not going—there is no possibility at all of having any such extension. That is really why I came here. Don't want to have anybody raise the question and nobody to be in position to say. The materials are not available. We want it but the materials are not there. Don't think we want to go out of New York City anyway.

Commissioner Mahaffie: That possibility has been discussed at various times.

Mr. Hertzoff: The Mayor of Yonkers; the subject of abandonment came up—I think he did take it up with the City Administration. I was told definitely, the hearing has been had. The fact come up that we absolutely—that there won't be any such.

[fol. 507] I'd like to reserve a few minutes if something else comes up to reply.

Commissioner Porter: Mr. Gray.

Oral Argument of Mr. Horace M. Gray Appearing on Behalf of the Committee of Yonkers Commuters.

If the Commission pleases. I represent the Committee of Yonkers Commuters who are very much interested in keeping this line in continuous operation. I shall digress from the general order of my argument because of questions which have just been raised this morning.

It is very significant that the line seemed to be a prosperous and a paying line while the 9th and 6th Avenue elevated ran through to Sedgwick Avenue, which was the terminus of this line. You see this line from Yonkers runs down to the main line of the Putnam where it joins there about the center of this chart.

Then the traffic continues down to the terminus at Sedgwick Avenue. You will see there the legend "shuttle". That shuttle in 1938, up to 1940, was an integral part of the 6th and 9th Avenue elevated, under which it ran down Columbus Avenue until it branched off further down town.

They formed a very important artery of intracity traffic.

Commissioner Mahaffie: Is that shuttle still in operation?

Mr. Gray: It is still in operation, it runs from 155th [fol. 508] Street to the side of the river over to 167th Street on the East side of the river. People there are able to transfer from Sedgwick Avenue to this shuttle either taking the independent subway at their 155th Street Station or go to the east and take the I. R. T. Subway, and go right down to the Battery.

Within the last week my committee has issued some questionnaires. In any exceptions I have raised I have made the proposal that the future of this line, the Yonkers Branch and Putnam going to Getty Square, could be very greatly affected for the better if it were extended down as to make a terminal at 161st Street where the Independent subway and the I. R. T. cross, intersect at that point, it would make an almost ideal transfer point up town and relieve a lot of the traffic of transferring at Grand Central Station which is now over crowded.

Mr. McLean: That wasn't in the testimony.

Mr. Gray: No.

Mr. McLean: The proposal he is making now was not considered in the testimony, we have no chance to go into it at all.

Commissioner Mahaffie: When you are speaking of the Independent subway, which do you mean?

Mr. Gray: I think this is clear. I can explain it on this map. Your Honor will see on the upper right hand corner the 8th Avenue subway.

[fol. 509] Commissioner Mahaffie: Is that the one you mean by Independent?

Mr. Gray: Yes. Built by the City. That branches off south of 155th Street, swings across the Harlem River. Over here where you see the Lexington Avenue subway the two intersect right at the Yankee Stadium. Mr. McLean is quite correct in saying there is nothing in the record about except the map. It is a method which is feasible, but as I have said within the last few days I have, well, to go back a bit, we sent out questionnaires about a week ago to ascertain about how many people would be interested in taking, in having the line extended to see whether there would be any practical result. Then I was informed that the City of New York has a project already, I got in touch with the engineers of the Board of Transportation. Their

plans are all practically completed for extending the line of the I. R. T., the Lenox Avenue branch which you will see on the left hand edge of the map. It says Lenox, I. R. T. That runs up to a point above West 145th Street where there is a dead end. There the project the City now has in mind is to continue that line up under the bridge at West 155th Street and connect with this shuttle so that the shuttle will then become a part of the Broadway subway, and will at least supply the same type of transportation which was supplied when the 6th and 9th Avenue elevated were in existence.

[fol. 510] This is a project of which there is nothing in the record. The reason why I bring it up now is because I think we should consider it because I think that I have, under the rules, the right to ask for a rehearing within 30 days after the decision. Rather than let it go for 30 days and then bring it up they might accuse me of stalling. I wish to have the thing considered with the idea of having a further hearing in Yonkers so we can amplify the record of this particular circumstance. Because with that I think there is no doubt the line will be completely rehabilitated.

Commissioner Mahaffie: Whose project is this?

Mr. Gray: The Board of Transportation of the City of New York.

Commissioner Mahaffie: Is your brother who just spoke on it to be able to speak for them?

Mr. Hertzoff: No, I definitely can say, the idea and all of these things are on a map. We have been met sometimes with this kind. There is a map that has certain things on it. We met that in the Whitestone abandonment 20 years ago. There is no subway there yet. It is a route.

Commissioner Mahaffie: It is a map that is why I asked my question of you. The map I have seen at various times.

Mr. Hertzoff: I will be glad to have somebody that can say any better than I. I doubt it. That is the main reason I came down. I really didn't want to come down and duplicate what the company said and what the examiner said.

[fol. 511] We didn't want to leave any impression there was a possibility we were going to do something. It isn't our desire to back these people up in Yonkers there, but if they think we can save them, we feel we are unable to do it. We have abandoned lines. We have abandoned lines there within the last 4 or 5 years because of conditions similar to this. There wasn't enough money, we got permis-

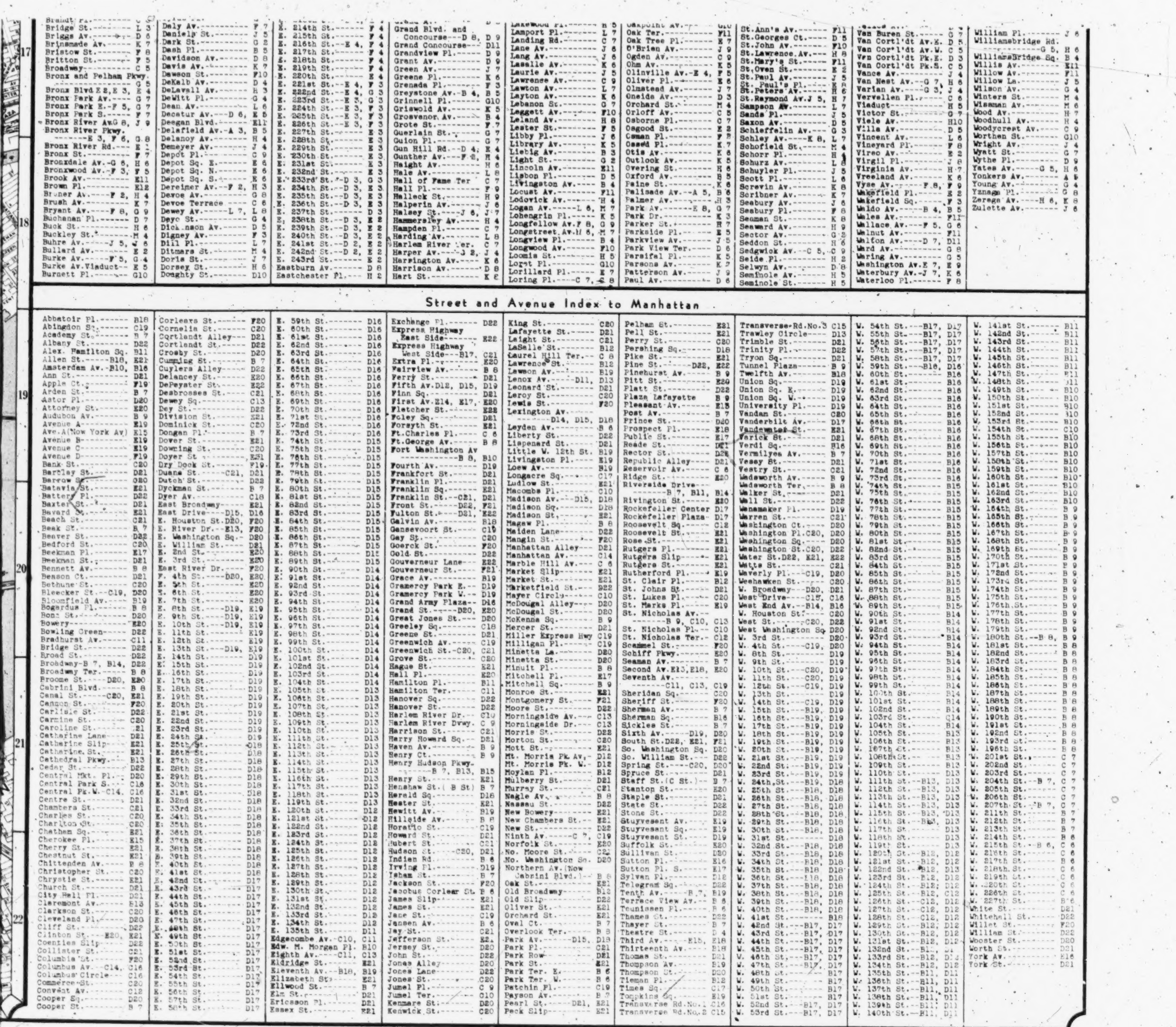
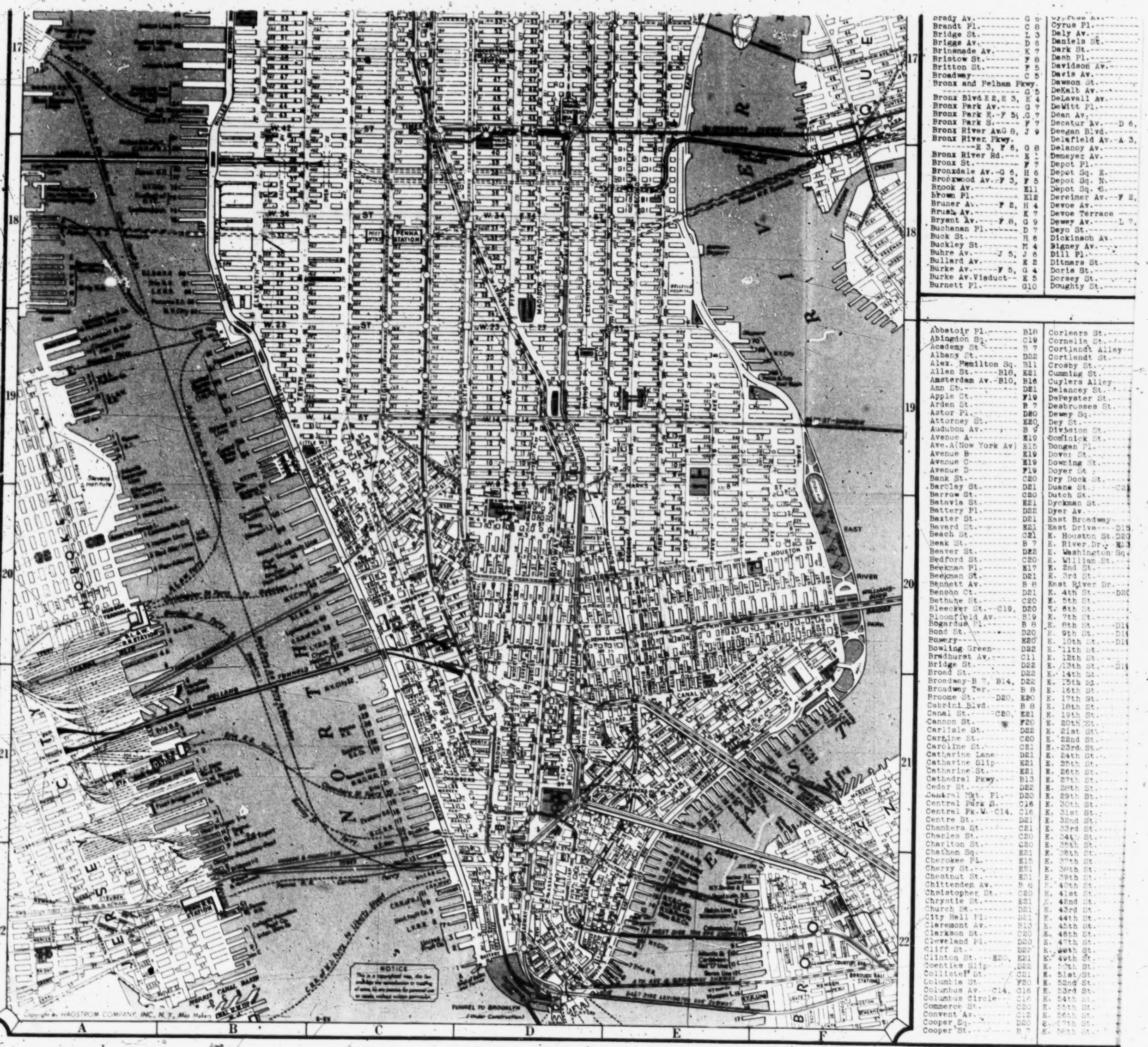
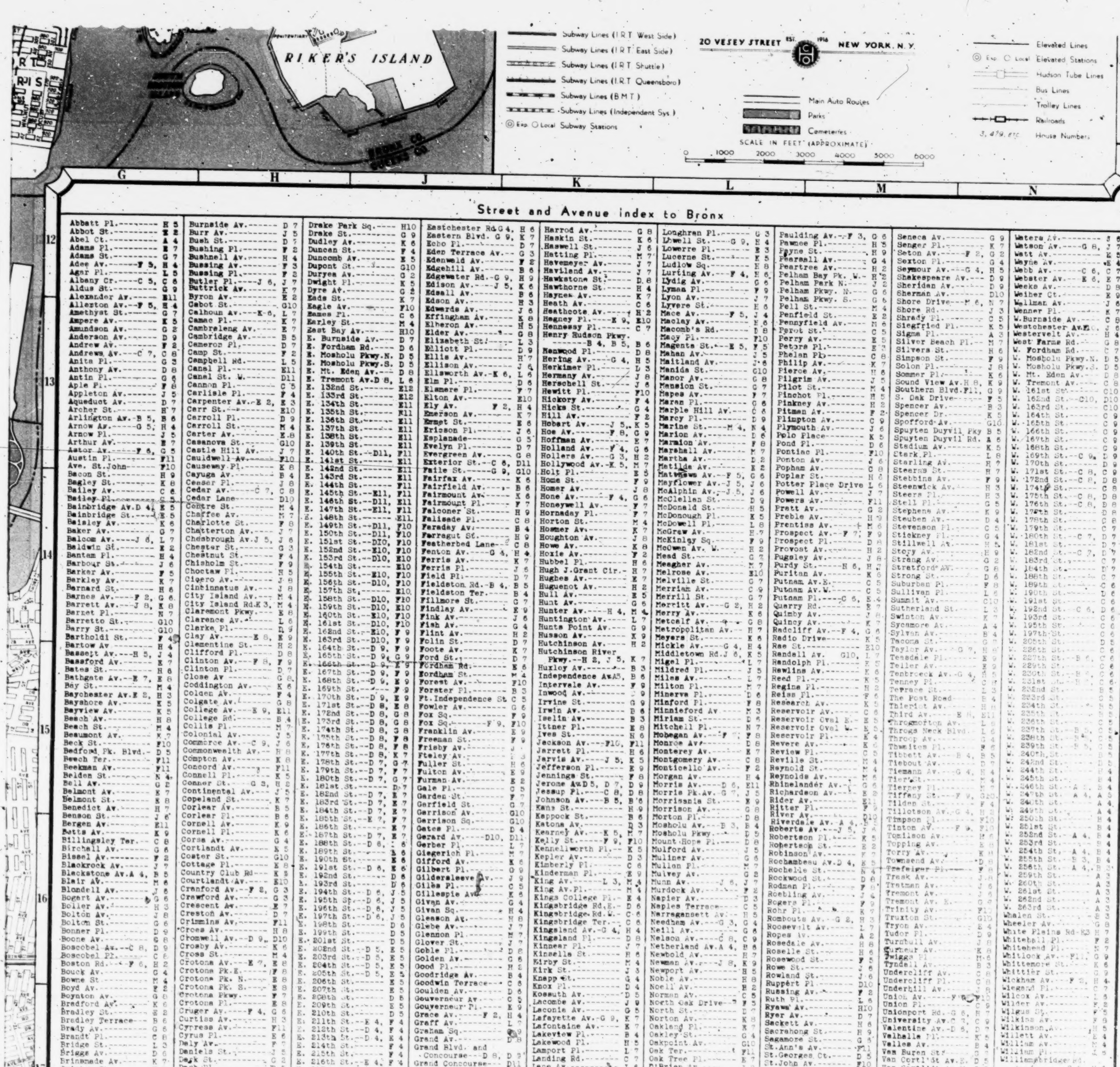
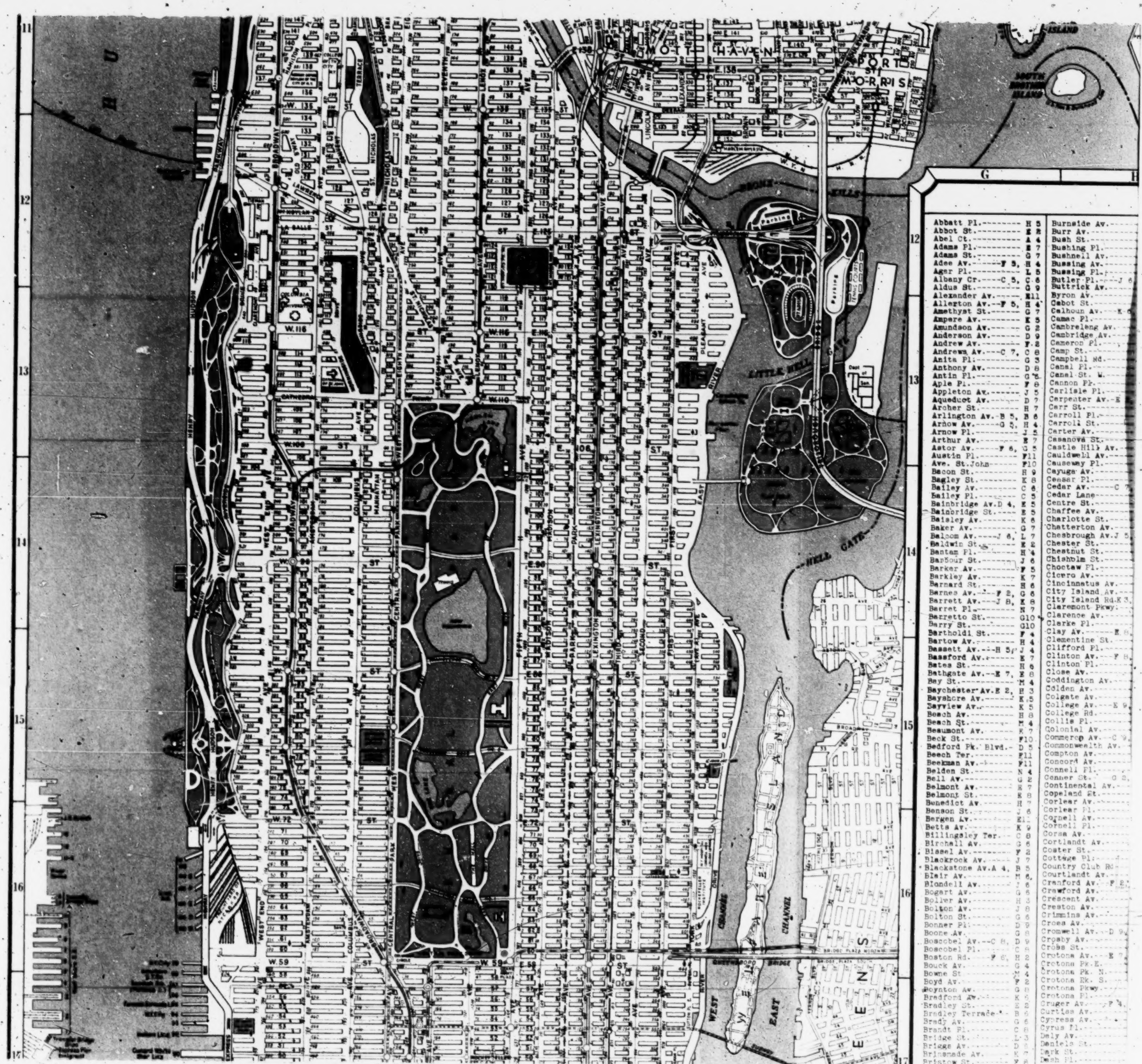
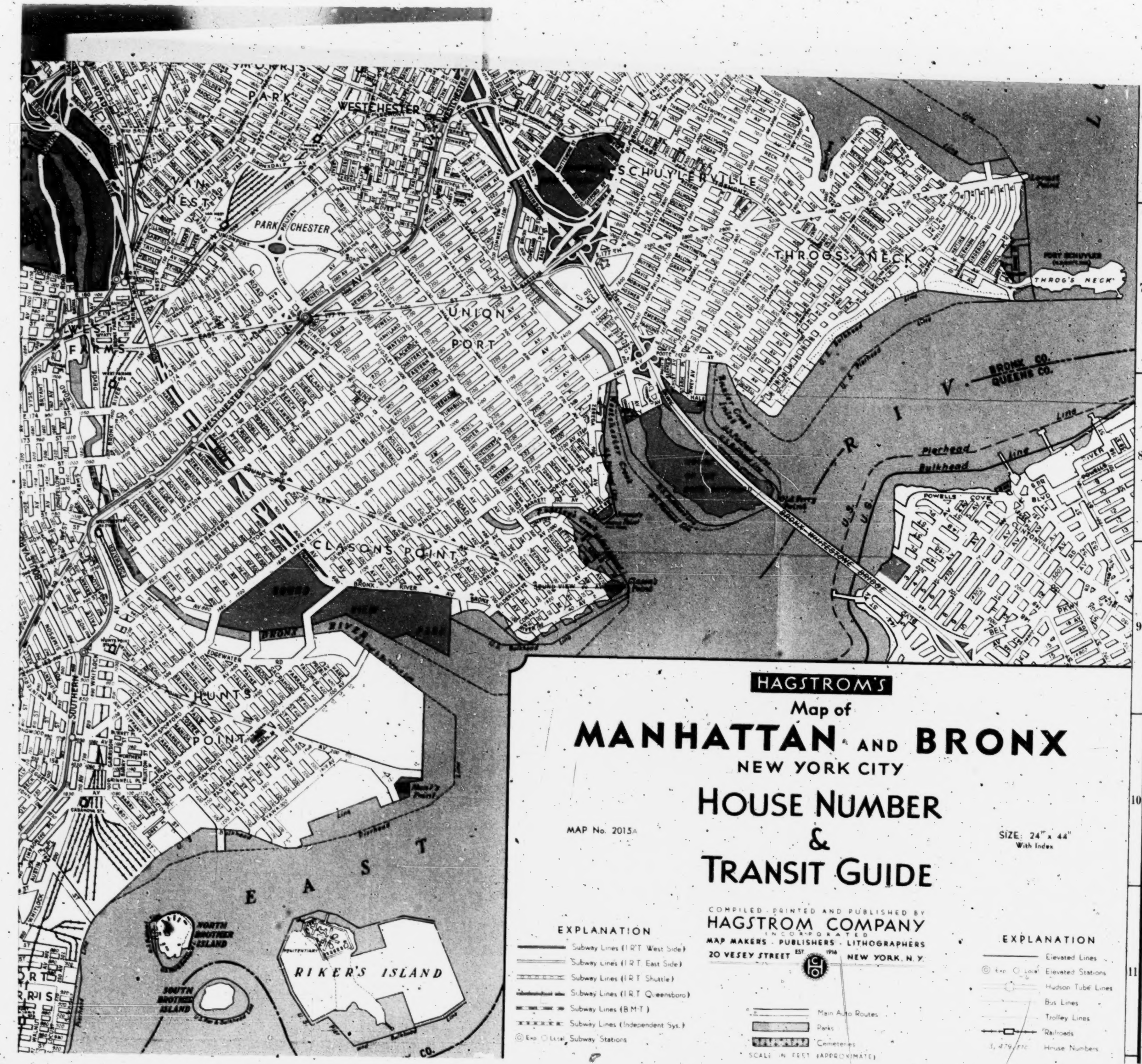
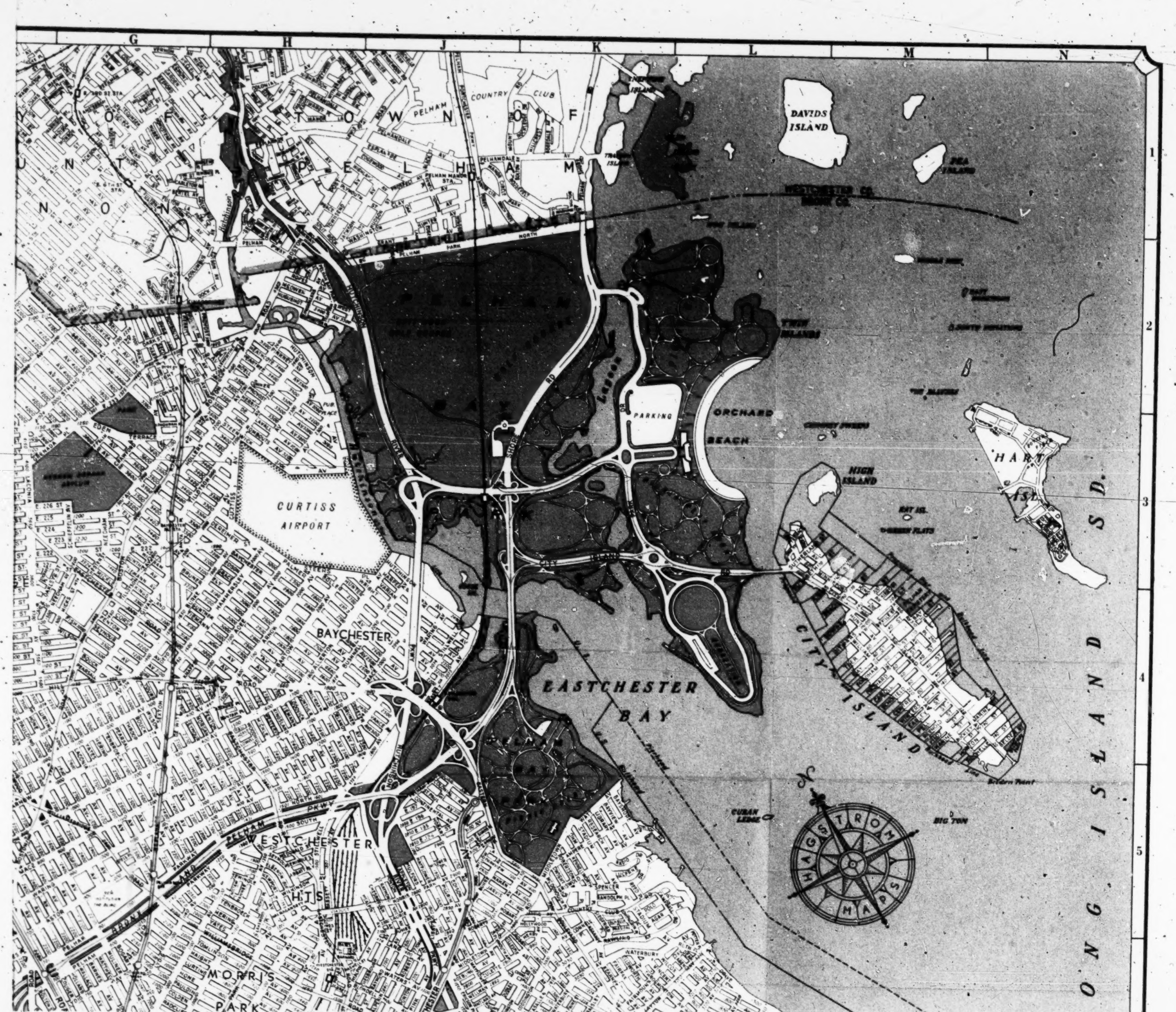
sion from the Transit Company to abandon it. There was a lot of opposition too.

Mr. Gray: I have here 2 blue prints under which the line is made out. I discussed the matter with Mr. Windsor who is one of the Chief Engineers in its construction branch, he told me the plan and specifications are substantially completed; The work will be started immediately after the war.

Commissioner Mahaffie: That is all you say outside the record? On this record as it is and as we have got it do you contend there is any other answer to the applicant than that of the examiner?

Mr. Gray: Yes, sir. I brought this question up because it is now in the case. I didn't want to leave it out. I wanted to treat the Commission and my friends fairly and bring the question up now rather than after your Honors had made some decision.

We claim in the first place the applicant has not really [fol. 512] furthered this line at all, that whenever traffic has dropped it was an excuse for taking trains off. That as soon as it is dropped a bit more they have taken some important trains off. There hasn't been any real effort, as appears in the record, to develop the line. The line is now in the course of the traffic increasing. The figures in the record show as of August 1, 1942 there had been increase of 2.87 percent. Since then there has been a serious curtailment in gas and rubber. The use of private cars, I think, took a lot of the business away from the Putnam, has been seriously curtailed. I have noticed myself as commuter on the line that the traffic has increased. I have asked, as suggested in my brief, that a further count be made so the Commission will be able to ascertain what the present situation is. The existence of the bus line that runs, it runs from the Yonker Station, makes a horse shoe cut through Park Hill and back within a block of Lowerre, half block of Lowerre, along side of the Caryl Station, then goes down to the Ludlow Station on the Hudson Division, is now working at peak capacity. The request has been issued by the O. D. T. for the bus to supply proposals for decreasing their service by 10, 20, and 30 percent. They can't handle the traffic now. People in order to catch the trains on the Hudson Division can't rely on these busses to make the trains when there is only a matter of two or three minutes leeway. They must take a bus from 15 to



In respect to a possible Broadway subway extension, no assurance can be given that it will ever be carried out. Certainly it is not reasonable to force the New York Central Railroad to continue a non-profitable operation for many years in order to provide a connection to a non-existent and highly dubious future subway extension. I therefore request on behalf of the City that the petition for re-hearing be denied.

Very truly yours, Robert Moses, Park Commissioner,
Member of the City Planning Commission.

[fol. 540] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 21-271

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
et als., Plaintiffs,

v.

UNITED STATES OF AMERICA et als., Defendants

Before Clark, Circuit Judge, and Conger and Rifkind,
District Judges.

Action by the Public Service Commission of the State of New York (State Division, Department of Public Service), City of Yonkers, and John W. Tooley, Jr., as the chairman and presiding officer of Committee of Yonkers Commuters, a voluntary unincorporated association, against United States of America, the Interstate Commerce Commission, and the New York Central Railroad Company under 28 U. S. C. A. §§41(28) and 43-48 to enjoin and set aside a certificate and order of the Interstate Commerce Commission authorizing the New York Central Railroad Company to abandon a line of railway between Van Cortlandt Park Junction, New York, New York, and Getty Square, Yonkers, New York. Judgment for the defendants.

John T. Ryan, Asst. Counsel, Public Service Commission, of New York City (Gay H. Brown, Counsel, Public Service Commission, and George H. Kenny, both of New York City, on the brief), for plaintiff Public Service Commission.

[fol. 513]. 20 minutes earlier in order to make the train they would otherwise make by taking the Putnam Division.

As a matter of fact, the bus line which was put in operation in 1939, advanced as one reason for granting it the franchise that the service rendered on the Putnam Division, which is now requested to be abandoned, was so inadequate that people were forced to take the main line.

The general result of all this application would be if it were granted to force at least 80 percent of the traffic which now goes down on the Yonkers branch and transfers at Pipers or University Heights, to go over and take the Hudson River Branch immediately, that directly and thereby save perhaps \$50,000 or \$60,000 operating expenses on the Hudson, on the Yonkers Branch and still get the great majority of the traffic without this expense.

There is another feature, the actual deficit which is complained of here amounts to about \$56,000. That is made up principally, although their figures run to \$71,000, the \$71,000 figure is that excess above \$56,000 which represents 5 percent on the salvage value of the line for abandonment. It is perhaps looked upon as capital investment charge.

Mr. McLean: The hope.

Mr. Gray: The hope.

The major charge in this \$56,000 figure is municipal taxes. City taxes collect about \$56,000 annually. The City of [fol. 514] New York about \$11,000 for just running through the corporate part. Those tax figures I assume were allocated on a mileage basis from the whole taxes that were charged against the Putnam Division within the City of New York. From the tax standpoint there is no benefit derived by the railroad from the operation of the line through Van Cortlandt Park. No fire protection, no water, no sewer, no nothing. Our position is if the railroad company wanted to really put this line on a paying basis they could have easily reduced their tax bill to almost a negligible figure.

Mr. McLean: How?

Mr. Gray: By insisting on having tax reduction.

Commissioner Mahaffie: They have probably been insisting on all they can find in recent years, haven't they?

Mr. Gray: There is nothing in the record about it. There are some passages in the record where the corporation counsel then in office asked why they hadn't come around and asked for further tax reductions, that they had

Connection from Rockaway Line to Fulton Street Extension:	
Construction and Equipment of a 2 track subway and open cut; intersection of the Rockaway and Fulton Street Lines	\$ 2,220,000
Second Avenue Line:	
Construction and Equipment of a yard and a 2 and 4 track subway from Coenties Slip, Manhattan, to Harding Avenue, The Bronx	223,060,000
Worth Street Line:	
Construction and Equipment of a 2 and 4 track subway from Church Street to the Bowery, Manhattan	11,500,000
Houston Street and Utica Avenue Line:	
Construction and Equipment of a 2, 4 and 6 track subway, river tunnel and yard. Route extends along various streets from Essex Street, Manhattan, to Avenue U, Brooklyn	169,320,000
Dyre Avenue-Pelham Bay Line Connection:	
Construction and Equipment of a 2 track connection between the Dyre Avenue-East 174th Street Line at East 174th Street, and the Pelham Bay Line of the IRT Division at Hunts Point, The Bronx	2,420,000
Concourse Line Extension:	
Construction and Equipment of a 2 track viaduct and subway along Burke Avenue from 205th Street to Seymour Avenue, The Bronx	12,590,000
Sixth Avenue Line (2 additional tracks):	
Construction or acquisition and Equipment of 2 additional tracks along the route of the Sixth Avenue Line, from West 9th Street to West 31st Street, Manhattan	19,270,000
Flushing Line Extension to Bayside:	
Construction and Equipment of a 2 and 4 track subway, Embank- ment and open cut, via Roosevelt Avenue from Main Street, Flushing to Bell Boulevard, Bayside, Queens	12,070,000
Hillside Avenue Extension (2nd Step):	
Construction and Equipment of a 4 track subway along Hillside Avenue from 184th Street to 212th Street, Queens	18,775,000
Worth Street Line Extension:	
Construction and Equipment of a 2 track subway and river tunnel; the Bowery, Manhattan, to Driggs Avenue, Brooklyn	27,000,000
Hillside Avenue Extension (3rd step):	
Construction and Equipment of a 2 track subway along Hillside Avenue from 212th Street to Little Neck Road, Queens	15,550,000

OFFICE OF DEFENSE TRANSPORTATION

[General Order ODT 39]

PART 501—CONSERVATION OF MOTOR EQUIPMENT

REDUCTION OF MILEAGE—CARRIERS OF PASSENGERS

Pursuant to Executive Orders 8989, 9156, and 9294, in order to conserve and providently utilize vital transportation services, facilities, and equipment; and to provide for the prompt and continuous movement of necessary traffic, the attainment of which purposes is essential to the successful prosecution of the war, *It is hereby ordered, That:*

SUBPART AA—REDUCTION OF MILEAGE: CARRIERS OF PASSENGERS

- Sec.
- 501.360 General outline of order.
- 501.361 Reduction in mileage.
- 501.362 Emergency curtailment plans to be placed in effect.
- 501.363 Special and general permits.
- 501.364 Exemptions.
- 501.365 Definitions.
- 501.366 Applicability.
- 501.367 Communications.

AUTHORITY: §§ 501.360 to 501.367, inclusive, issued under E.O. 8989, 9156, 9294; 6 F.R. 6725, 7 F.R. 3349, 8 F.R. 221.

§ 501.360. *General outline of order.* This order provides that no person transporting passengers by motor vehicle for which a certificate of war necessity issued by the Office of Defense Transportation is outstanding shall operate within the area in which the order is applicable in any calendar week a greater number of motor vehicle miles than eighty (80) per cent of the total motor vehicle miles operated in the area by such person during the week ending May 22, 1943. It also requires those persons who submitted plans for emergency curtailment to the Office of Defense Transportation in response to a communication from the Director of the Office of Defense Transportation dated January 25, 1943, to comply with the order by placing in effect the plan submitted and designated plan No. 2.

The purpose of the order is to assure the continuity of service by carriers of passengers until July 25, 1943, the date to which the current allotment of motor fuel has been extended. If the current allotment of motor fuel is to be sufficient to permit carriers to continue op-

erations until July 25, 1943, curtailments in service in addition to those required by this order must be made voluntarily by the carriers themselves or by further orders of the Office of Defense Transportation.

It is recognized that there may be occasions when the rigid requirements of the order will interfere with production at war plants, activities of military installations, and other activities which are essential to the prosecution of the war. Section 501.363 of the order provides for the issuance of special and general permits to meet such situations as they arise.

The order is applicable within a limited area only. This area is described in § 501.366. It is the area in which there is a shortage of motor fuel at the present time.

§ 501.361. *Reduction in mileage.* No person shall, during any calendar week, operate in the area in which this order is applicable a greater number of motor vehicle miles than eighty (80) per cent of the total motor vehicle miles operated by such person in such area during the week ending May 22, 1943.

§ 501.362. *Emergency curtailment plans to be placed in effect.* Each person who submitted plans for emergency curtailment to the Office of Defense Transportation in response to the communication from the Director of the Office of Defense Transportation dated January 25, 1943, shall comply with this order by placing into effect the plan submitted by each such person and designated as plan No. 2.

§ 501.363. *Special and general permits.* The provisions of this order shall be subject to any special or general permit issued by the Office of Defense Transportation to meet specific needs or exceptional circumstances.

§ 501.364. *Exemptions.* The provisions of this order shall not apply to the operation of a motor vehicle (a) when engaged in ambulance service, or (b) by school authorities or pursuant to a contract with school authorities for the purpose of transporting students, teachers, and school employees to and from school.

§ 501.365. *Definitions.* As used in this order (§§ 501.360 to 501.367), or in any

order, direction or permit issued hereunder, the term:

(a) "Person" means any individual, partnership, corporation, association, joint stock company, business trust, or other organized group of persons, or any trustee, receiver, assignee, or personal representative, and includes any department or agency of the United States, any State, the District of Columbia, or any other political, governmental or legal entity;

(b) "Motor vehicle" means any rubber-tired vehicle propelled or drawn by mechanical power and used upon the streets or highways for the transportation of passengers and with respect to which a certificate of war necessity issued by the Office of Defense Transportation is outstanding;

(c) "Motor vehicle miles" includes all miles of actual motor vehicle operation, whether in passenger service or otherwise.

§ 501.366. *Applicability.* The provisions of this order shall be applicable within the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania (except the portions which lie within the corporate limits of the cities of Sharon, Sharpsville, Farrel, and Wheatland), Rhode Island, Vermont, Virginia (except the portions which lie within the corporate limits of the cities of Bristol and Bluefield), the District of Columbia, and the portion of West Virginia which lies within and east of the counties of Mineral, Grant and Pendleton.

§ 501.367. *Communications.* Communications concerning this order should be addressed to the Division of Local Transport, Office of Defense Transportation, Washington, D. C., Boston, Massachusetts, or New York, New York, and should refer to "General Order ODT 39".

This General Order ODT 39 shall become effective May 27, 1943.

Issued at Washington, D. C., this 27th day of May, 1943.

JOSEPH B. EASTMAN,
Director, Office of Defense
Transportation.

John J. Broderick, of Yonkers, N. Y. (Paul L. Bleakley, Corp. Counsel, of Yonkers, N. Y., on the brief), for plaintiff City of Yonkers.

Horace M. Gray, of New York City, for plaintiff Tooley. [fol. 541] Robert L. Pierce, Sp. Asst. to Atty. Gen., of Washington, D. C. (Tom C. Clark, Asst. Atty. Gen., of Washington, D. C., on the brief), for defendant United States.

J. Stanley Payne, Asst. Chief Counsel, Interstate Commerce Commission, of Washington, D. C. (Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, of Washington, D. C., on the brief), for defendant Interstate Commerce Commission.

Thomas P. Healy and Harold H. McLean, both of New York City, for defendant New York Central Railroad Company.

OPINION—Filed June 10, 1943

PER CURIAM:

Plaintiffs make three points in attacking the order of the Interstate Commerce Commission authorizing the abandonment of this short railway in Bronx and Westchester Counties, New York; namely, lack of jurisdiction of the Commission, lack of evidence to support the conclusion that continued operation of the line would constitute an undue burden on interstate commerce, and lack of a fair hearing because the Commission after its decision denied motions to reopen the hearing for the production of further evidence. Under the circumstances here disclosed, the first alone seems to us to present matters not strictly within the scope of the Commission's expert determination.

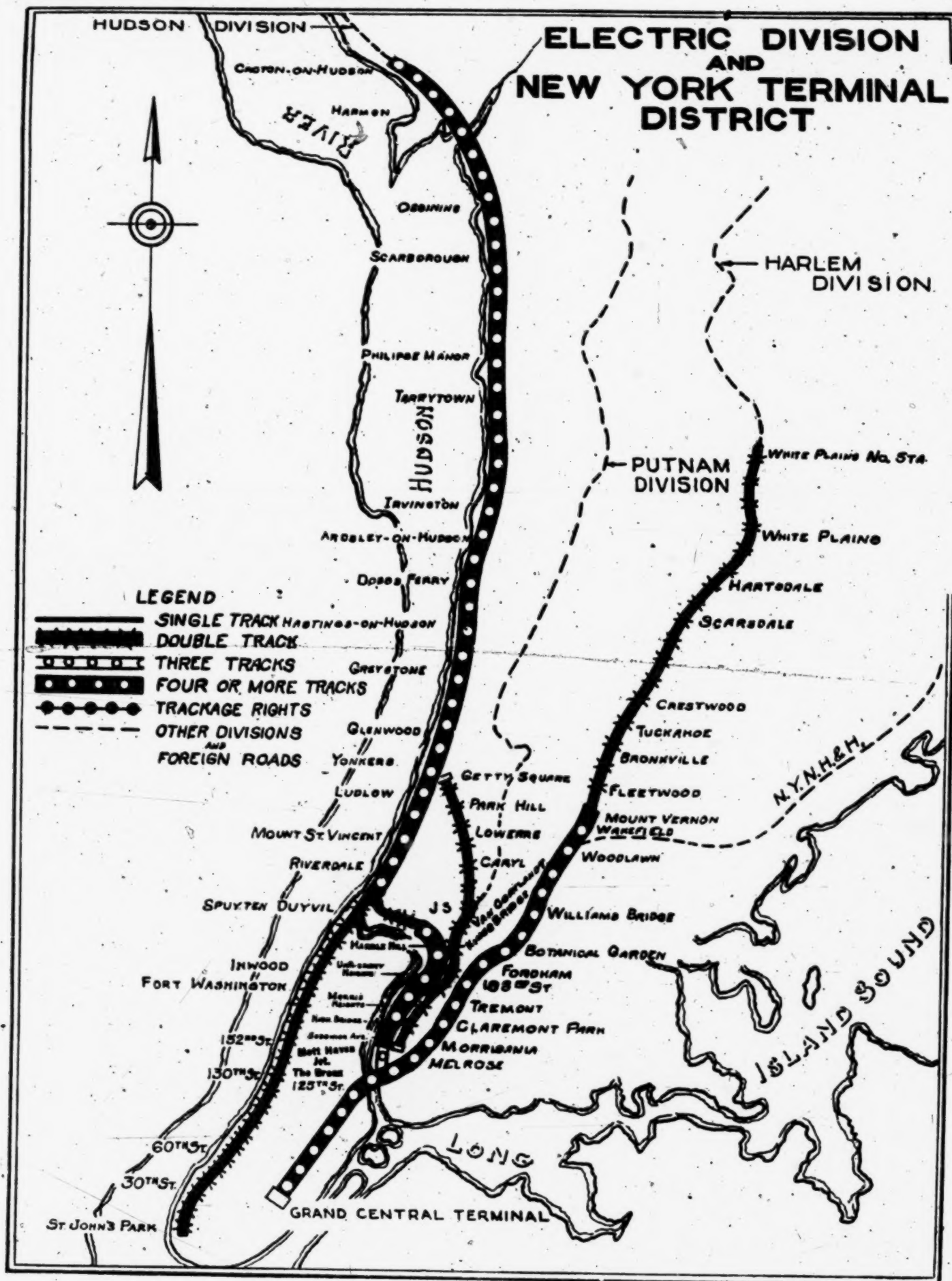
The asserted lack of jurisdiction of the Commission rests on the contention that the railway to be abandoned is of the kind expressly excepted from the control of the Commission by 49 U. S. C. A. § 1(22), which state that "the authority of the commission * * * shall not extend to the * * * abandonment of * * * street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." The challenged order authorizes the New York Central to abandon 3.1 miles of a branch electric passenger railway from Van Cortlandt Park Junction, New York City, to Getty [fol. 542] Square, Yonkers, New York, and to suspend serv-

always been very reasonable with them. From the standpoint of City of Yonkers request made in the last few days that the City of Yonkers reduce the taxes to the railroad company because if we give the railroad company some \$20,000, remit so much in taxes, we will save about \$120,000 that would result from lower assessed valuations, it would mean that that tax income must be spread over the City and come out of the pockets of the tax payers [fol. 515] anyway. I think the chances of getting reduction in taxes are very favorable. If this Commission were to grant the application, which I hope they will not, I suggest that there be a proviso or extended period of 2 months as was done in the Whitestone Landing case to permit the City of Yonkers to take the necessary steps to reduce their tax rate and their tax assessment and that similar effort should be made as to the City of New York of the line that goes through Van Cortlandt Park.

We are not in position here of a burned-out line that has served its usefulness in a time of boom, and the boom has passed on and there is nothing more to be expected from it. We have this line running through a very populated area in Yonkers. It has been made to pay at a time when the City of New York provided a close connection with their rapid transit system. If we are permitted to introduce evidence of this Lenox Avenue extension I think that will also show the Commission that we haven't had a real opportunity of making the line pay.

In the third place, we are now faced with a gas and rubber shortage. We submit that rail transportation which requires the consumption of no gas, no rubber, should not be scrapped when it can take the place of gas and rubber which is now being used which will probably be curtailed more in the future.

[fol. 516] Again we say that this line, even if the expenses were as alleged, does not amount to a burden on interstate and foreign commerce for the reason that the total net earnings of the whole line amount to some twenty-six million dollars, the net earnings being \$26,000,000 in 1941. This is hardly more than a peanut system compared with the earnings that the line is making. So, from a practical standpoint, the proportions are so infinitesimal that they can not result in any appreciable effect on interstate commerce.



Van Wyck Boulevard Line:

Construction and Equipment of a 2 track subway via Van Wyck Boulevard, from Hillside Avenue to Rockaway Boulevard, QUEENS.. \$ 15,340,000

Flushing Line Extension to College Point:

Construction and Equipment of a 2 track elevated railroad, via 149th Street and 11th Avenue, from Roosevelt Avenue to 122nd Street, College Point, QUEENS 14,100,000

Nostrand Avenue Extension:

Construction and Equipment of a 2 track subway and Elevated line from Flatbush Avenue to Voorhies Avenue, Brooklyn 22,700,000

Fulton Street Line Extension to 229th Street:

Construction and Equipment of a 2 and 4 track subway, via Linden Boulevard from 106th Street to 229th Street, QUEENS ... 49,120,000

Brooklyn-Staten Island Tunnel:

Construction and Equipment of a 2 track subway and river tunnel from 4th Avenue and 60th Street, Brooklyn, to New Brighton and Tompkinsville, Staten Island 44,010,000

Sixth Avenue Line Extension:

Construction and Equipment of a 2 track subway from 53rd Street to 145th Street, through Central Park and along Morningside Avenue, Manhattan 34,750,000

SEVENTH AVENUE Line Extension:

Construction and Equipment of a storage yard and a 2 and 4 track subway and river tunnel via 72nd Street, Manhattan, and Horace Harding Boulevard, QUEENS from 59th Street, Manhattan, to Marathon Parkway, QUEENS 166,620,000

Second Avenue Line Extension:

Construction and Equipment of a 2 track river tunnel and subway from Coenties Slip, Manhattan, to Court Street, Brooklyn 22,020,000

Franklin Avenue Line:

Construction and Equipment of a 2 track subway from Eastern Parkway to Lafayette Avenue, Brooklyn, to connect the Brighton Beach Line, BMT Division with the Crosstown Line of the IND Division 8,830,000

Fort Hamilton Parkway-10th Avenue Line:

Construction and Equipment of a 2 track subway from 37th Street to 86th Street, Brooklyn 16,970,000

Total \$992,655,000

NOTE: The foregoing estimates include administrative, legal, and engineering costs.

There is no heavy expenditure in line, where the line would require expenses of \$2,000,000 for grade crossing elimination. We have this war on our hands now. We don't know what will happen immediately after the post war reconstruction period. To throw a real asset, a possible asset, out the window in an era of uncertainty, we don't think will appeal to this Commission.

The alternate routes which are described are by no means equivalent routes. People may get to New York. There is no doubt about it. There is a distance of about 14 miles from Yonkers down to Grand Central Station. Many of the people who are using the line are office help, working people. They have a hard enough job to keep up their morale with the wages they are getting, the expenses they are under with high cost of living, and to force them to take a long trip on a trolley car, wait perhaps 5 or 10 minutes in driving rain or snow storm and all kinds of inclement weather for a car to come along, to crown in and take the 6 or 8 mile trip on the subway from 242nd Street down, we think should not appeal and that the public as such should not be burdened. This draws from a pool of about 30,000 inhabitants in Yonkers.

Commissioner Mahaffie: Nevertheless, isn't the street car subway a good deal cheaper way of going to New York than the commutation on this Division?

Mr. Gray: Not enough to make the inconvenience worth it. I take the line from Park Hill to Sedgwick Avenue then I take the subway up to Wall Street. It costs me \$6.13 for commutation. It costs me 10¢ a day each way for the subway. If I were to go by the Grand Central, my commutation would run \$8.00 or \$9.00, I'd still have ten cents to pay. All these people who are using the Hudson Line, either the main line or the branch, eventually have to take the subway either at Grand Central or some other place.

Commissioner Mahaffie: Do you take this at High Bridge?

Mr. Gray: No I do at Sedgwick Avenue.

Commissioner Mahaffie: Do they reserve a seat for you?

Mr. McLean: He could go down to Grand Central and get the Subway. He gets off at Sedgwick Avenue because he thinks he has a better chance to get a seat.

Mr. Gray: I meet the people who transfer at Grand Central, transfer and come down.

[fol. 518] Commissioner Mahaffie: He gets on your line, at the end of the line. That might help him.

Mr. McLean: One man at the hearing testified, I think, during the depression he had to get up. When he got his job back he came back on the line again. That little extra money continued there.

Mr. Gray: The bus service can not be relied upon at all. How much time do I have? I am giving some to Mr. Bleakley.

Commissioner Porter: You have very few minutes.

Mr. Gray: About 29 now?

Commissioner Porter: Yes.

Mr. Gray: The bus service is very serious. It appears in the record there are two more busses available for this bus line. It also appears these two busses were used by the bus line in a New York City service and the O. D. T. required their removal. So they really are spares that have been taken off at New York. I doubt seriously whether the O. D. T. would permit busses which were supposed to be saved to be brought up and put in the Yonkers service. Those busses carry 25 seated and 12 standees each, but between 7:33 in the morning and 8:07 there are about 360 odd passengers take the train at either Lowerre or Caryl, those 2 busses would have to accommodate all those 360 odd people within a half hour, besides the school [fol. 519] children use that at their peak period.

Commissioner Mahaffie: Wouldn't it be feasible at Caryl even to walk over to Lincoln and get service there? It is less than half a mile isn't it?

Mr. Gray: Yonkers is a very hilly locality. Most of us have one leg shorter than the other from walking along side of hills. There is a trolley service runs along McLean Avenue over to Lincoln. The train service from Lincoln is not satisfactory according to what the commuters tell me.

Commissioner Mahaffie: They don't reserve the seats there?

Mr. Gray: No, it is a steam line. The trolley service isn't adequate in rainy weather or inclement weather of any kind people have to stand on the street corner 15 minutes to half an hour in order to be sure to catch the train. As a matter of safety they must take the car or bus, the second bus ahead of their proposed train time in order not to miss it.

I thank you.

Commissioner Porter: Mr. Bleakley, you have 15 minutes.

Mr. Hertzoff: I won't mind letting him have some of my time.

Oral Argument of Mr. Paul L. Bleakley Appearing for the City of Yonkers

I think I'll have enough time.

[fol. 520] I am not permitted to practice. I have applied but haven't received any notification as yet. I hope I may be granted the indulgence of speaking.

Commissioner Porter: It is all right.

Mr. Bleakley: I appear here on behalf of the City of Yonkers. I do not propose to reiterate in detail a matter that has been set forth in the exceptions that have been heretofore filed. I do want to touch upon two or three points I feel are of considerable importance to the people of the City of Yonkers, particularly the commuters, the significance of which I think may have been overlooked by the examiner.

I am quite impressed first by the admitted increase in traffic upon this line sought to be abandoned which is approximately 3 percent, I think 2.87 is the exact figure. To me that is significant in connection with the abandonment in two phases.

First of all, it shows that at least temporarily and during present conditions that the railroad has turned the corner. While it is true that this increase is not as great as the increase shown on the other lines of the railroad, nor is it as great as I think the conceded bus increase of approximately 15 percent, it is significant that they are carrying more traffic now than heretofore. The most important feature of that increase though, as I see it, is the fact that [fol. 521] it points toward it, and when I refer to the increase in this sense I mean not only the increase on the line sought to be abandoned, but on the other lines, it bears upon the adequacy of the other facilities for taking care of the commuter traffic.

Mr. Gray spoke briefly in answer to one of the Commissioner's questions about the Lincoln Station. I don't think if anybody really knew the topography of Yonkers that it could be seriously argued that that would be an available means. It is a considerable jaunt over hills. You can't quite go there as the crow flies.

THESE proposed projects are arranged in order of priority but changes in the City's financial condition or in the volume and flow of travel may cause this program to be amended in future years, and therefore it should not be regarded as rigid and inflexible.

This Board is aware that the present financial resources of the City are not sufficient to permit the adoption at this time of any considerable part of this future program, but deems the first five projects to be so urgently needed that any postponement will seriously hamper it in meeting the reasonable requirements of the travelling public.

The 169th Street station, which now serves as a temporary terminal of the QUEENS Boulevard Line, was designed to be simply a local station but is being used by over 12,000,000 incoming passengers per year. The first step of the Hillside Avenue Extension is intended to alleviate this condition by providing a new terminal station with facilities adequate to handle the full Express service of the QUEENS Boulevard Line.

The Ninth Avenue elevated line, until its operation was discontinued, enabled residents along the JEROME AVENUE Line to reach places of business on the west side of Manhattan without change of trains. These passengers now transfer to and from the Concourse line either at the Polo Grounds station or at the Yankee Stadium station. The necessity for this transferring discourages full use of the JEROME AVENUE Line and tends to intensify the congestion on the Concourse Line. This condition can best be remedied by the building of a track connection over which through service can be operated between the JEROME AVENUE Line and the LENOX AVENUE Subway; this connection is to extend from 155th Street and 8th AVENUE to 145th Street and LENOX AVENUE.

The carrying capacity of the Fort Hamilton, West End, Sea Beach, Culver and Brighton Beach services is limited by the track capacity of the Fourth AVENUE subway in Brooklyn. To relieve the overcrowding on these lines it is proposed to divert some of the traffic to the Prospect Park and Coney Island line of the IND Division. One means of doing this is the Culver Line connection now included under pending projects of the Capital Budget Requests for 1942; the other is a connection between the West End line and the Prospect Park and Coney Island line. The authorization of this project will enable the Board to give badly needed transit relief to a large population in the southerly part of Brooklyn.

The 60th Street Tunnels of the BMT Division can accommodate a substantial volume of traffic in addition to that now flowing through them and this presently unused capacity could be utilized to accommodate a part of the rapidly increasing load on the QUEENS Boulevard Line of the IND Division. A track connection between these lines in Long Island City is needed to handle this growing traffic.

ice of the so-called Yonkers Branch, which includes the operation of electric trains not merely over the line to be abandoned, but also between Van Cortlandt Park Junction and Sedgwick Avenue on the Putnam main line, a distance of 4.69 miles. All other operations of the Putnam Division, which extends north beyond Van Cortlandt Park Junction as far as Brewster, New York, are by steam.

In asserting that this is but a suburban or interurban line unconnected with the rest of the Central's railroad system, plaintiffs rely on certain expressions in cases such as *Piedmont & Northern Ry. Co. v. I. C. C.*, 286 U. S. 299, 52 S. Ct. 541, 76 L. Ed. 1115, and *United States v. Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, 53 S. Ct. 245, 77 L. Ed. 583, stressing electric interurban and suburban passenger service, among others, as significant factors to be considered. It appears, however, both from these cases and from others, that the question is a practical one of operation of the system, and that if an electric passenger line is operated as part of the general steam railroad system of transportation its abandonment is within the Commission's power. See, inter alia, *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. 111; *Hudson & M. R. Co. v. Hardy*, 2 Cir., 103 F. 2d 327, certiorari denied 307 U. S. 640, 59 S. Ct. 1038, 83 L. Ed. 1521; *Sprague v. Wall*, 7 Cir., 122 F. 2d 128, certiorari denied 314 U. S. 669, 62 S. Ct. 131, 86 L. Ed. 535; and the *Piedmont* case, *supra*. Here we have no doubt but that this railway was so operated. The facts that it was electric and furnished only passenger service and that it could not run over the remaining tracks of the Central's Putnam Division do not control the showing that it was in fact operated by the railroad as a part of that [fol. 543] division and its general system. The use of part of the Putnam tracks, the transfers given to other parts of the line, the general repair and maintenance of the Branch, and other details of operation—all appear intertwined with the operation of the system as a whole.

Without attempting to rehearse here all the significant facts, we may note, as an example of this interconnection, the fact that the bulk of the traffic on the Yonkers Branch transfers at High Bridge or University Heights to the Central's Hudson Division, where suburban trains run to and from the Grand Central Station on a through-line whose ultimate end is Chicago. Plaintiffs expressly admit that the suburban or intrastate trains on the Hudson Division

[fol. 530] EXHIBIT No. 7 BEFORE STATUTORY COURT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
(State Division, Department of Public Service), City of
Yonkers, and John W. Tooléy, Jr., as the Chairman and
presiding officer of Committee of Yonkers Commuters, a
voluntary unincorporated association composed of more
than seven members, Plaintiffs,

against

UNITED STATES OF AMERICA and THE NEW YORK CENTRAL
RAILROAD COMPANY, Defendants

AFFIDAVIT

STATE OF NEW YORK,

County of Westchester,

City of Yonkers, ss:

Sheldon L. Pollock, being duly sworn, deposes and says:
That he is an Attorney and Counsellor-at-Law, having his
office at #20 South Broadway, Yonkers, New York, and is
also Counsel for the Yonkers Bus Co. Inc., and also War
Transportation Administrator for the City of Yonkers,
New York.

That as such Transportation Administrator he received
an Order from the Office of Defense Transportation requir-
ing the transportation companies which operate on gaso-
line, such as taxis, and trucks, in the City of Yonkers to re-
duce mileage by 40%, and bus companies to reduce their
mileage by 20%.

- That after receipt of said order, your deponent as such
Administrator, held a conference with bus operators who
operate lines in the City of Yonkers on Thursday, May 27,
1943.

That at this conference representatives of the Suburban
Bus Company, Inc., Club Transportation Corporation,
Yonkers Bus Co. Inc., and Bernaechia Brothers Bus Co., at-
tended. That the bus lines they represented cover most of
the City of Yonkers.

That after said conference it was agreed that the Club
Transportation Corp. and all other bus companies which

With respect to the other methods, it seems to me with respect to what is an acknowledged increase we are attempting, as it were, to cut the cloth of 1941 or 1942 and make it fit 1943. The traffic is increasing. The matter that Mr. Gray spoke about in connection with the busses, I think, is extremely important. The President of the bus company testified that they would endeavor, he believed they could I believe is the effect of his testimony, accommodate a substantial part of the excess traffic by means of these two extra busses that he may not even be able to get because, as Mr. Gray has pointed out, there may be serious question as to the availability or the granting of permission for the use of those busses. I think the strength of that argument is rightly admitted if we look at the reply to the exceptions of the railroad. They comment on the exceptions [fol. 522] that have been filed by Mr. Gray and myself. But instead of attempting to analyze the inadequacy of the bus transportation, they simply pass it all off and say he has spoken. The President made the statement that he could with his bus company handle a substantial portion of the increased traffic. I think that portion of the testimony should be analyzed most carefully to see if the conclusion of all or any part, any material part of that excess traffic can in fact be handled by the railroad, by the bus company.

Now I think the most important and the most vital factor in this application coming as it does at the present time, is to whether anybody, is to whether anyone is in position to say that the future traffic can be adequately handled. As those who are familiar with the situation, and I think it appears in a general way in the minutes as you know, a great volume of the commuter traffic was handled by automobiles, people going up and down in their private automobiles. The restrictions on automobiles have become even greater since the hearings in November. As we all know, a great many of us, I am included in this, kept my car until the license period expired. Many, many cars have not been relicensed. That condition, in fact, today is much more serious than it was at the time of the hearing. If we abandon, once the tracks are taken up and taken some place [fol. 523] else it will be rather difficult procedure to supplement by means of the railroad the transportation that has been taken away. It seems to me with the extreme

are parts of the through steam railroad system to Chicago. Yet so intimately connected is this Yonkers Branch with the same operation that seats must be provided on the Hudson trains for all the transferred Yonkers passengers merely for the short run from the present end of the Yonkers Branch to the Grand Central Station, whereas those same seats would be available for the Yonkers commuters at the Ludlow and Yonkers stations on the Hudson Division near the present terminus of the Yonkers Branch—the chief alternate means of transportation available for the patrons of this Branch. In other words, the Central now provides on the branch in question service which is substantially duplicated for these passengers on its Hudson Division, concededly within the Commission's jurisdiction. It would be highly unrealistic to say that that duplicating service must be viewed as something apart from even the Hudson Division, not to speak of the Putnam Division, with which it shares trackage. We conclude that the Commission had jurisdiction in the premises.

[fol. 544] Criticism of the conclusion that continued operation of the line was an undue burden on interstate commerce rests primarily upon the claimed present prosperity of the Central, concerning which the Commission made no specific findings. The Commission did, however, write a careful opinion in which it found a loss on the operation of this Branch in excess of \$56,000 a year and also set forth several alternative means of transportation—by bus, street railway, and ordinary railroad service—to the middle of New York City, and held that abandonment here was in the public interest. Under the circumstances the evidence before the Commission was adequate, and the Commission's conclusion well within its authority. Simply because the Central was generally prosperous does not mean that the Commission could not authorize the abandonment of a losing branch; otherwise a railroad would stand committed to drains upon its income for costly and unnecessary service until complete bankruptcy intervened. *Purcell v. United States*, D. C. Md., 41 Supp. 309, 313, affirmed 315 U. S. 381, 62 S. Ct. 709, 86 L. Ed. 910; *Town of Inlet, N. Y. v. New York Cent. R. Co.*, D. C. N. D. N. Y., 7 F. Supp. 781; *Colorado v. United States*, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878; *Transit Commission v. United States*, 284 U. S. 360, 370, 52 S. Ct. 157, 76 L. Ed. 342.

BEFORE THE traffic of the Rockaway Branch of the Long Island Railroad can be added to that of the IND Division it is essential that provision be made to route a large portion of it via the Fulton Street Subway; the purpose being to avoid upsetting the established travelling habits of thousands of passengers but chiefly to prevent the intolerable congestion which would otherwise ensue on the Queens Boulevard Line. To accomplish these purposes there will be needed an extension of the Fulton Street subway from Grant Avenue, Brooklyn, to 106th Street, QUEENS.

Additional data, to be transmitted later, is now in preparation relative to pending projects for which appropriations have been authorized to be made.

Yours very truly,

JOHN H. DELANEY,
Chairman.

have been giving a 12 minute service, will reduce their [fol. 531] schedules to 16 and 20 minute headway during non-rush hour periods during the day. That during rush hours most transportation facilities are loaded to capacity. That on Sundays and Holidays most bus lines operating on a 15 or 20 minute schedule will reduce their headway to 30 or 40 minutes respectively. That on and after June 30, 1943, certain bus routes in East Yonkers serving Roosevelt High School and Public Schools 8, 7, and 15 will be discontinued until next Labor Day, September 6, 1943. That all night service will be eliminated after 1 A. M.

That your deponent believes that the bus service cannot be curtailed any further than is outlined above because no other transportation facilities are available, and a number of defense plants would, in the opinion of your deponent, be dangerously affected by a further decrease in bus service.

That the bus company serving Ludlow Station will reduce its non-rush hour schedule and also its Sunday and Holiday service in order to reduce its mileage by 20%. That the Ludlow Station referred to is the station located in the City of Yonkers, New York on the main line of the New York Central Railroad Company, and the bus service referred to is mostly cross-city service from the said station to locations within the area of the Putnam Railroad, Yonkers Branch, which it is proposed to abandon.

That in the opinion of your Deponent because of the bus situation in Yonkers brought about by the scarcity of rubber and gasoline and the present order of the Office of Defense Transportation reducing mileage of bus transportation 20%, the proposed abandonment of part of the Yonkers Branch Putnam Division should not be allowed at this time and the said Railroad should be directed to continue the service until there is a lessening of the shortage of rubber and gasoline and until the Order of the Office of Defense [fol. 532] Transportation reducing bus mileage 20% is rescinded or made more liberal.

Sheldon L. Pollock.

Sworn to before me this 1 day of June, 1943. James F. White, Jr., Notary Public, Westchester County.

emergency with which we are all faced, with the uncertainty of the future, and considering the relatively small amount of loss to the railroad, particularly where, over a period of three or four years there has been a spread from the 20 mile net loss to a 26 mile gain in the annual net income of the railroad, it seems to me that the prudent thing to do, the wise thing to do under the circumstances, is to deny this application for abandonment if, as and when conditions change, if as and when the traffic gain drops off the railroad can come in and be heard. It seems to me at the present time no such drastic step should be taken that can not be corrected later on if it should develop a mistake has been made.

Thank you.

Commissioner Porter: Mr. McLean.

Reply Argument of Mr. Harold H. McLean

Mr. McLean: I have very little to add. In connection with this bus situation. It is my recollection from the testimony a witness for the railroad testified as to interview he had with the man in charge of the Office of Defense Transportation. He stated there was an endeavor to limit bus mileage, but in the event any bus company had an increase in traffic due to the abandonment of some other means that [Vol. 524] that would be taken into consideration in requiring them to reduce mileage. Some of that testimony appears on page 78 of the record. So that the fears these people expressed that the O. D. T. won't allow the bus company to use the bus, are ungrounded. There were plenty of opportunities at the hearing for them to get the facts. The facts are this bus company has the extra busses. There is no reason in the world why they can't use them. The two busses were used in an apartment house route. Not a common carrier route. They had a private contract with a couple of apartment houses to have these busses go at a certain time of the day. The O. D. T. said only common carrier service was entitled to the use of the busses, they took them off for that reason.

The suggestion that all these people are going to come over to the Ludlow Station by means of these busses is significant because it indicates that the service being provided on the branch is a duplicate service and that these people could come over to the Ludlow Division. They

Denial of a rehearing was clearly within the Commission's discretion, 49 U. S. C. A. § 17(6); the claimed additional evidence was not of the kind to persuade to a different conclusion. The evidence was claimed to show that a New York subway would be extended to the terminus of the Yonkers Branch, that Yonkers and New York could or would reduce tax assessments, and that the present crisis in gasoline would reduce bus transportation. But the City of New York, which favored abandonment, showed that building of [fol. 545] the subway extension was at best a matter for the quite indefinite future and there was no hope of tax abatement there; and if prospects of lessened taxes in Yonkers were brighter, at most the reduction would be less than \$9,000 per year. And there were alternative methods of transportation not dependent upon bus service. The suggestion that this loss may be used to reduce Central's excess profits tax suggests interesting possibilities for keeping declining roads alive; it may, however, be safely left with the Commission. The Commission had already allowed plaintiffs a full hearing, although not required by law to do so. *Woodruff v. United States*, D. C. Conn., 40 F. Supp. 949; 49 U. S. C. A. §§ 1(1)(a), 20a(6). Its denial of a further hearing cannot, therefore, be attacked here. The inconvenience which may result to former patrons of the line is, of course, regrettable, though this community seems to have more available, even if not wholly as desirable, substitute means of transportation than many which have lost trolley service in recent years. At any rate, the declining patronage shows that the public has not had sufficient use for this railway to keep it alive.

Though the hearing was originally set upon the plaintiffs' motion for a preliminary injunction, by agreement of the parties it was continued on the merits. Hence final disposition of the case can now be made. Certain evidence offered by the plaintiffs and objected to by the defendants we think can be held admissible on the issue of jurisdiction of the Commission and due process as to its hearing, even though it does not persuade us to a different view of the case. We think the plaintiffs have shown no ground for relief, either preliminary or final, and accordingly their action must be dismissed on the merits. No findings of fact by us are necessary or appropriate under the circumstances; we may state our conclusions

should come over to the Hudson Division in order to relieve the branch from providing what is essentially a duplicate service. If we felt with assurance these people would have come over we would have put into our figures an amount representing the income to the line from this traffic. As it is we assumed in our figures, the examiner assumes in his figures, that all of the traffic is lost.

[fol. 525] The suggestion of Mr. Gray that we keep the line open until the City of New York gets through with a certain project number, whatever it is, hold it until after the war is entirely visionary. We can't tell what the City of New York will choose to do after the war, who the Mayor will be or what projects will go through.

Furthermore, right at this time we need the cars that are being used on this line, these 11 M. U. cars will release a similar number of cars I spoke of that are being used on the other Division.

I haven't spoken of the scrap value of the rails and bridges and ties, tie fastenings, etc. That is rather obvious. There are about 2,000 tons I believe. That is needed in the war effort. We all like to wave the flag. I am waving it rather slowly in respect to the scrap value, but I do think the necessity of the cars is something that can not be overlooked. We can't get 11 standard cars for use in passenger service any better way than I know of than to take them off this line.

I thank you.

Commissioner Porter: Mr. Hertzoff, you had a few minutes.

Mr. Hertzoff: I have nothing, except if the Commission feels this 177th Street extension, it happened so late that even I didn't know about it. They have some figures on it. I'd be glad to go and get them.

[fol. 526] When the Whitestone case came on, it was brought to the Commission's attention, the city had the route which would take the subway over to the north there, and go on to Whitestone, in question. I don't know whether that was a dominating influence in helping the Commission abandon it, it was referred to in the Commission's opinion that we were about to go there and compete with them, to let the railroad get out, that we were going to get there eventually. But we are not there yet. From what I know about this subject, I don't think they will invest any more

shortly that the Commission had jurisdiction and acted within its lawful powers in making the order.

The clerk is directed to enter judgment for the defendants at once, as provided in Rule 58, F. R. C. P.

Dated at New York, N. Y., June 10, 1943.

Charles E. Clark, U. S. Circuit Judge. Edward A. Conger, U. S. District Judge. Simon H. Rifkind, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Judgment rendered upon filing the opinion herein, June 10th, 1943.

George J. H. Follmer, Clerk.

[fol. 548] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR ORDER GRANTING STAY—Filed June 11, 1943

To the Hon. Charles E. Clark, Circuit Judge, and Hon. Edward A. Conger and Hon. Simon H. Rifkind, District Judges:

The plaintiffs, City of Yonkers and John W. Tooley, Jr., as President of Committee of Yonkers Commuters, a voluntary unincorporated association composed of more than seven members, respectfully petition this Court and allege:

That they feel themselves aggrieved by the final decree and judgment of the District Court of the United States for the Southern District of New York rendered in this cause on June 10, 1943, denying an injunction against the certificate and orders of the Interstate Commerce Commission here involved, and intend to appeal therefrom to the Supreme Court of the United States as soon as the papers necessary to effect said appeal can be prepared and an order allowing said appeal obtained.

That said plaintiffs also intend to apply to the United States Supreme Court, or to one of the Justices of that

EXHIBIT No. 8 BEFORE STATUTORY COURT

JOHN M. DELANEY
CHAIRMAN
FRANK X. SULLIVAN
COMMISSIONER
GEORGE KEEGAN
COMMISSIONER

BOARD OF TRANSPORTATION
OF
THE CITY OF NEW YORK
70 HUDSON STREET
TELEPHONE CANAL 8-8600

WM. JEROME DALY
SECRETARY
RALPH R. MONROE
COUNSEL
JESSE B. SNOW
CHIEF ENGINEER

June 17, 1941

Hon. Rexford G. Tugwell, Chairman
City Planning Commission
Municipal Building
NEW YORK, NEW YORK

Dear Sir:

The Board of Transportation presents herewith a program for expansion of transit facilities, in the form prescribed for submission of proposed new projects for the Capital Budget for 1942 and the Capital Program for subsequent years. The new program comprises:

Hillside Avenue Extension (1st step) to provide a proper terminal; Construction and equipment of a 4 track subway along Hillside Avenue from 178th Street to 184th Street, QUEENS	\$ 3,980,000
Broadway-Lenox Avenue Line Extension: Construction and equipment of a 2 track subway and elevated connection to the 162nd Street spur of the Jerome Avenue Line, IRT Division	3,260,000
West End Line-Smith Street Connection: Construction and equipment of a 2 track subway and ramp connection between the West End Line of the BMT Division and the Smith Street-Prospect Park Line of the IND Division along Fort Hamilton Parkway, Brooklyn	6,120,000
QUEENS Boulevard Line-60th Street Tunnel Connection: Construction and equipment of a 2 track subway connecting the QUEENS Boulevard Line of the IND Division with the 60th Street Tunnel of the BMT Division	13,280,000
Fulton Street Extension: Construction and equipment of a 4 track subway via Pitkin Avenue and Linden Boulevard; from Grant Avenue, Brooklyn, to 106th Street, QUEENS	21,300,000
Rockaway Line: Construction and equipment, acquisition and reconstruction of a 2 and 4 track subway, embankment and elevated system from QUEENS Boulevard to and along the Rockaway Peninsula, QUEENS	36,480,000

money. I am not an engineer. If we have already got most of the customers, I don't see how we are going to spend any money to add on investments, unless it is going to bring a lot more customers.

Commr. Porter: I forgot, Mr. Luhrsen, you wanted a few minutes, did you?

Mr. Luhrsen: Yes. We filed a petition to intervene. It did not arrive until March 1st.

Mr. McLean: We have a copy:

Oral Argument of Mr. J. G. Luhrsen on Behalf of Railway Labor Executives Association

Mr. Luhrsen: If the Commission please, I want to make the statement we did in the other case. We protest against this abandonment; particularly a wealthy property like this when it happens to lose a lot of money, then it is abandoned; they care little about the inconvenience of the [fol. 527] public, and perhaps much less about the employees who lose their positions.

So we respectfully request, at least if the Commission should decide to grant this abandonment, which I hope you do not, that you afford the employees protection in case they are virtually affected by this abandonment.

Mr. McLean: I might say this branch is operated as a part of the Putnam Division. The employees that operate the trains we propose to abandon do have employment on the general division. We do not anticipate that it will cause any displacement of employees. That is a matter which only the future can tell. When the war is over and conditions change, if they do.

Mr. Luhrsen: In the eventuality of displacement, however, the junior man will be out of a job.

Mr. McLean: I appreciate that.

Mr. Luhrsen: Yes.

Commr. Porter: This case is submitted and will be taken under advisement by the Division. The Division will now adjourn.

(Whereupon, at 12:30 o'clock p.m. oral argument in the above-entitled matter closed.)

(Here follow 2 exhibits 4, 6, side folios 528 and 529)

Court, for a stay and order restraining, enjoining and suspending the operation, execution, effect and enforcement of the orders and certificate of the Interstate Commerce Commission involved herein, and restraining and enjoining the defendant, The New York Central Railroad Company, from in any manner abandoning or attempting to abandon and curtailing or attempting to curtail its present operation of its so-called Yonkers Branch until the United States Supreme Court hears and determines said appeal.

[fol. 549] That petitioners are informed and believe that unless it is enjoined by this Court, the defendant, The New York Central Railroad Company, will hasten to act under the authority of the Interstate Commerce Commission and will discontinue the service on its so-called Yonkers Branch on June 12, 1943, which said action will take place prior to the time when plaintiffs can prepare the necessary papers in support of their application to the United States Supreme Court or a Justice thereof for a stay pending the appeal to be taken herein.

That unless the present application is granted by this Court, and in the event service upon said railroad line is abandoned, the said plaintiffs will suffer irreparable damage in that (a) the members of the public using this line will be deprived of the use of a line which admittedly affords better service than the other routes available to them for use and will be compelled to use other means of transportation which will consume more of their time, varying from twenty minutes to two hours or more per day; (b) under the most recent governmental restrictions on the use of privately owned automobiles and public bus transportation systems, the present users of said Yonkers Branch or a large part of them may be entirely without means of transportation to their places of work; (c) as shown by the undisputed evidence before the Interstate Commerce Commission and the Court, real property values in the area served by the lines will decline by at least 10%, with concomitant detriment to all of the taxpayers in the City of Yonkers and serious loss in revenues to the City itself; (d) that petitioners will be deprived of the benefit of their right to have the United States Supreme Court or a Justice of said Court pass upon their application for a stay pending determination of the appeal to that Court before they are caused to suffer the irreparable damage described herein.

[fol. 538] EXHIBIT "A" BEFORE STATUTORY COURT

[fol. 539]

(Copy)

[Stamp:] Interstate Commerce Commission. Received
May 1, 1943. Section of Mails and Files.

The City of New York, Department of Parks

Arsenal
64th Street and Fifth Avenue
Central Park
New York City

April 30, 1943.

Hon. W. P. Bartel, Secretary, Interstate Commerce Com-
mission, Washington, D. C.

DEAR SIR:

At the request of the Mayor of the City of New York, I am writing to state the City's position in respect to the petition for re-hearing of the application of The New York Central Railroad Company, Finance Docket 13914, for authority to abandon its Yonkers Branch, which is located partly within the City of New York.

It is our opinion that the abandonment should be authorized in view of the losses entailed in operation, the existence of other adequate means of transportation, and the benefit to the City Park System which would result from the removal of the line through Van Cortlandt Park.

The suggestion in the petition for re-hearing that the City of New York will reduce the taxes on the right-of-way through Van Cortlandt Park by \$10,000.00 deserves no consideration whatever. It must have been made in total disregard of the fact that New York City collects less than \$11,000.00 taxes on this property. It is obvious that talk of such reduction is idle and irresponsible; and is made solely for the purpose of prolonging the proceeding. The City has no reason for perpetuating a line through one of its important parks by reducing the taxes on that line. The taxes now paid do not compensate the City for the inconvenience caused to its citizens by the maintenance of the line through Van Cortlandt Park.

That this application is also based upon the facts set forth in the verified complaint in this action and upon all of the affidavits submitted by the plaintiffs in support of their motion for a temporary or interlocutory injunction pending final decision of this proceeding upon the merits. [fols. 550-551] Wherefore, plaintiffs respectfully request this Court to grant an order restraining, enjoining and suspending the operation, execution and enforcement of the certificate and order of the Interstate Commerce Commission dated March 20, 1943, as extended by its orders dated April 19, 1943 and May 26, 1943, and enjoining and restraining the defendant, The New York Central Railroad Company, its officers, agents and employees, and all other persons, from taking any action in pursuance of said orders of the Interstate Commerce Commission and from in any manner abandoning or attempting to abandon the present operations over the so-called Yonkers Branch until the hearing and determination by the United States Supreme Court, or a Justice of said Court, of plaintiffs' application for a stay pending the determination of their appeal from the judgment and decree rendered in this case on January 10, 1943, and for such other, further or different relief as the Court may deem appropriate.

Dated, June 10, 1943.

City of Yonkers, by John J. Broderick, John W. Tooley, Jr.

Duly sworn to by John J. Broderick and John W. Tooley, Jr. Jurats omitted in printing.

[fol. 552] [File endorsement omitted.]

Service of a copy of the within petition for stay is hereby admitted this 11th day of June 1943.

H. H. McLean for New York Central R. Co.

J. Stantey Payne, for Def. Interstate Com. Comm.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING STAY—June 11, 1943.

The within petition for a temporary stay is granted, the stay to be only until application is made to the Supreme

Court of the United States or a Justice thereof, and in no event longer than June 19, 1943 at 12 midnight.

Charles E. Clark, United States Circuit Judge.
Edward A. Conger, U. S. D. J. Simon H. Rifkind,
D. J. PM.

[fol. 552-A] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR APPEAL—Filed June 14, 1943

City of Yonkers and John W. Tooley, Jr., as President of Committee of Yonkers Commuters, a voluntary unincorporated association composed of more than seven members, plaintiffs; feeling themselves aggrieved by the final judgment rendered by the District Court in this cause on June 10, 1943, pray an appeal therefrom to the Supreme Court of the United States. The particulars wherein they consider the final judgment erroneous are set forth in the assignment of errors which are filed herewith and to which reference is made.

They pray that a transcript of the record, proceedings and papers on which the final judgment rendered herein was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States:

Dated, June 11, 1943.

Paul L. Bleakley, Corporation Counsel, Solicitor for
the City of Yonkers. Horace M. Gray, Solicitor
for John W. Tooley, Jr., as President of the Com-
mittee of Yonkers Commuters.

[fol. 553] IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 14, 1943

The City of Yonkers and John W. Tooley, Jr., as President of Committee of Yonkers Commuters, a voluntary un-

incorporated association composed of more than seven members, plaintiffs, now come, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final judgment of the District Court rendered and entered herein on June 10, 1943.

The District Court erred—

1. In failing to set aside and annul the order and certificate of the Interstate Commerce Commission dated March 20, 1943, as extended by orders made on April 19, 1943 and May 26, 1943 in Finance Docket #13194.
2. In failing to issue a permanent injunction setting aside, annulling and suspending said orders and certificate and enjoining and restraining the enforcement, execution and operation of said orders and certificate.
3. In failing to make any findings of fact and conclusions of law with respect to the issues presented in this action and in deciding and determining that "no findings of fact by us are necessary or appropriate under the circumstances."
4. In failing to find that the so-called Yonkers branch, which the Interstate Commerce Commission authorized to be abandoned, is in fact and in law a suburban or inter-urban electric railway which is not operated as a part or parts of a general steam railroad system of transportation [fol. 554] and that the Interstate Commerce Commission possesses no jurisdiction to entertain the application for or to act with respect to its abandonment.
5. In failing to find and decide that the Public Service Commission of the State of New York possesses exclusive jurisdiction with respect to the proposed discontinuance of the four stations on said electric line in the City of Yonkers, New York, and with respect to the proposed abandonment of service over said electric line between Getty Square, Yonkers and Sedgwick Avenue, New York City.
6. In failing to find and decide that the certificate and orders of the Interstate Commerce Commission were wholly in excess of its jurisdiction to make and are null and void.
7. In failing to find and decide that the plaintiffs were denied a fair and adequate hearing by the Interstate Com-

merce Commission by reason of the denial of plaintiffs applications for a further hearing or rehearing sought for the purpose of introducing evidence of materially changed conditions relating to facts found by the Commission as the basis for its determination and for the purpose of introducing newly discovered evidence which was not reasonably discoverable at the time of the original hearing before the Commission by the exercise of due diligence.

8. In finding and deciding that the Interstate Commerce Commission was not required by law to allow plaintiffs a full hearing and that its denial of a further hearing could not be attacked before the court.

9. In failing to find and decide that the order of the Interstate Commerce Commission was wholly void and should be set aside because of the lack of basic or essential findings with respect to the jurisdictional question as to whether or not the line between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is a suburban or interurban electric railway not operated as a part or parts of the general steam railroad system of transportation.

10. In failing to find and decide that the findings made by the Interstate Commerce Commission were insufficient to sustain the conclusion that continued operation of the so-called Yonkers branch would constitute an undue burden upon interstate commerce and upon defendant, The New York Central Railroad Company.

[Vol. 555] 11. In failing to find and decide that, under the circumstances presented, the estimated annual loss which the Commission found would result from continued operation of said Yonkers branch in the sum of \$56,914, could not as a matter of law constitute an undue burden upon interstate commerce and that the conclusion of the Commission in that respect was arbitrary and capricious.

12. In failing to find and decide that the action of the Interstate Commerce Commission in basing its determination upon findings which are unsupported by substantial evidence and in arriving at conclusions which are unsupported by adequate findings was arbitrary and capricious, and in violation of the legal rights of plaintiffs, and is wholly null and void.

13. In failing to find and decide that the procedure followed by the Interstate Commerce Commission as disclosed upon the trial of this action constitutes a violation of the due process clause of the constitution, said practice being for the Commission to communicate with the War Department with respect to steel scrap and secondhand rails in the absence of the other parties and with no opportunity to cross-examine or to exclude irrelevant facts.

14. In failing to find and decide that the reception and consideration of the letter of April 30, 1943 from Robert Moses constituted a violation of plaintiffs' rights to a fair and open hearing, in that said letter was received and considered by the Commission without copies of same having been transmitted to the other parties interested in the proceeding before the Commission in violation of the rules of the Interstate Commerce Commission governing the receipt and consideration by it of such documents.

Dated, June 11, 1943.

Paul L. Bleakley, Corporation Counsel, Solicitor for the City of Yonkers; Horace M. Gray, Solicitor for John W. Tooley, Jr., as President of the Committee of Yonkers Commuters;

[fol. 556] [File endorsement omitted.]

[fol. 557] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action, File #24-271

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (State Division, Department of Public Service), City of Yonkers, and John W. Tooley, Jr., as President of Committee of Yonkers Commuters, a voluntary unincorporated association composed of more than seven members, Plaintiffs,

against

UNITED STATES OF AMERICA and THE NEW YORK CENTRAL RAILROAD COMPANY, Defendants

ORDER ALLOWING APPEAL—Filed June 24, 1943

In the above entitled cause the City of Yonkers and John W. Tooley, Jr., as President of Committee of Yonkers

Commuters, a voluntary unincorporated association composed of more than seven members, plaintiffs, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final judgment rendered by the District Court of the United States for the Southern District of New York in this cause on June 1, 1943 and having also made and filed an assignment of errors and having in all respects conformed to the statutes and rules of the court in such case made and provided it is ordered and decreed that the appeal be and the same hereby is allowed as prayed for upon the filing of a bond as required by law.

Edward A. Conger, United States District Judge
New York, Dated June 11, 1943.

[fol. 558] [File endorsement omitted.]

[fols. 559-561] Citation in usual form, filed June 15, 1943, omitted in printing.

[fol. 562] IN THE UNITED STATES SUPREME COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

SIRS:

Please Take Notice that the following papers and documents are incorporated into the transcript to be transmitted to the United States Supreme Court as the record on appeal herein.

Complaint and the exhibits attached thereto and made part of said complaint.

Answer of United States of America.

Answer of the New York Central Railroad Company.

Answer of the Interstate Commerce Commission.

Stenographer's minutes taken on June 2, 1943 before the statutory court, composed of Honorable Edward A. Conger, District Judge for the Southern District of New York, Honorable Charles E. Clark, Justice of the Circuit Court of Appeals for the Second Circuit and Honorable Simon H.

Rifkind, United States District Judge for the Southern District of New York.

Transcript of the hearing held on November 12, 1942 before the Interstate Commerce Commission, Finance Docket 13914, and marked Exhibit "1" before the statutory court. [fol. 563] Order of the O. D. T. Direct Bus Operators to reduce their present mileage by forty percent or twenty percent, marked Exhibit "4" before the statutory court.

The minutes of the oral argument before the Interstate Commerce Commission held on March 3, 1943, in the same proceeding and marked Exhibit "2" before the statutory court.

A certified copy of an order made by the Public Service Commission of the State of New York on May 28, 1943, in re commission instituting an investigation on that commission's own motion with reference to the proposed abandonment of service of the New York Central Railroad Company, etc., marked Exhibit "3" and "3A" for identification.

Maps marked Exhibit "1A" before the statutory court.

Regulations issued by the Office of Price Administration covering restrictions imposed by the O. D. T. curtailing the use of gasoline and rubber for transportation purposes, subsequent to the date of the hearing before the Interstate Commerce Commission in November 1942, marked Exhibit "5" before the statutory court.

Map taken from the official time table issued to employees of the New York Central Railroad Company which purports to show the electric division in the New York Central Terminal district of that company, marked Exhibit "6" before the statutory court.

Affidavit of Sheldon L. Pollock, War Transportation Administrator for the City of Yonkers, marked Exhibit "7" for identification.

Letter dated June 17, 1941, addressed to Honorable Rexford G. Tugwell, Chairman of the City Planning Commission, marked Exhibit "8" before the statutory court.

Letter dated April 30, 1943, by Robert Moses, Commissioner, member of the City Planning Commission, marked Exhibit "A" before the statutory court.

[fols. 564-566] Opinion of statutory court dismissing complaint for a permanent injunction.

Judgment rendered by the court and filed June 10, 1943.

Petition for Appeal.

Jurisdictional statement as required by Rule 12 of the United States Supreme Court Rules.

Assignments of error.

Order allowing Appeal.

Notice of Appeal.

Petition to the statutory court and order for a stay granted by said statutory court.

Bond perfecting Appeal.

Citation.

Statement directing attention to the provisions of paragraph 3 of Rule XII.

Dated, June 17, 1943.

Yours, etc., Paul L. Bleakley, Corporation Counsel.

Solicitor for the City of Yonkers. John J. Broderick, of Counsel.

[fol. 567] SUPREME COURT OF THE UNITED STATES

AMENDED STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT, CITY OF YONKERS, AND DESIGNATION OF RECORD—
Filed July 8, 1943

Please Take Notice, that the following is an amended statement of the Points on which we intend to rely and a designation of the parts of the record which we think necessary for the consideration thereof, as provided by paragraph 9 of Rule 13 of the Revised Rules of the Supreme Court of the United States.

Points:

Point I

That the Interstate Commerce Commission had no jurisdiction over the railway which it is proposed to abandon for the reason that the said railway is a suburban or interurban electric railway and is not operated as a part or parts of a general steam railroad system of transportation.

Point II

That the authority of the Interstate Commerce Commission conferred by Section 1, paragraphs (18) to (21) of Title 49 of the United States Code does not extend to the abandonment of the railway in question which it is proposed to abandon by reason of the plain provisions of Section 1, paragraph (22) of said Title.

Point III

That the actual loss sustained by the railway proposed to be abandoned does not constitute an undue burden on interstate commerce when all the facts and circumstances surrounding said alleged loss are taken into account.

[fol. 568]

Point IV

That there was no overriding interest of interstate commerce involved in this case and as the proposed abandonment is only a curtailment of purely local service and the discontinuance of four stations in the City of Yonkers, the power to regulate this purely local service and the discontinuance of these stations is with the State of New York and not the Interstate Commerce Commission.

Point V

That the judgment below should be set aside by reason of the errors made by the Court below as set forth more specifically in our assignments of error dated June 11th, 1943, and filed with the Clerk of this Court on June 19th, 1943; that these assignments of error are fourteen in number and we propose to discuss in this point each specific assignment of error.

Point VI

That the appellant, City of Yonkers and its inhabitants will be irreparably damaged if there is an abandonment of said railway.

[fol. 569] Designation of the Parts of the Record which We Think Necessary

Complaint and the exhibits attached thereto and made part of said complaint.

Answer of United States of America.

Answer of the New York Central Railroad Company.

Answer of the Interstate Commerce Commission.

Stenographer's minutes taken on June 2, 1943 before the statutory court, composed of Honorable Edward A. Conger, District Judge for the Southern District of New York, Honorable Charles E. Clark, Justice of the Circuit Court of

Appeals for the Second Circuit and Honorable Simon H. Rifkind, United States District Judge for the Southern District of New York.

Transcript of the hearing held on November 12, 1942 before the Interstate Commerce Commission, Finance Docket 13914, and Marked Exhibit "1" before the statutory court.

Order of the O. D. T. Direct Bus Operators to reduce their present mileage by forty percent or twenty percent, marked Exhibit "4" before the statutory court.

The minutes of the oral argument before the Interstate Commerce Commission held on March 3, 1943 in the same proceeding and marked Exhibit "2" before the statutory court.

Maps marked Exhibit "1A" before the statutory court.

Map marked Exhibit H-8—Hearing before the Interstate Commerce Commission.

.

[fol. 570] Map taken from the official time table issued to employees of the New York Central Railroad Company which purports to show the electric division in the New York Central Terminal district of that company, marked Exhibit "6" before the statutory court.

Affidavit of Sheldon L. Pollock, War Transportation Administrator for the City of Yonkers, marked Exhibit "7" for identification.

Opinion of statutory court dismissing complaint for a permanent injunction.

Judgment rendered by the court and filed June 10, 1943.

Petition for Appeal.

Jurisdictional statement as required by Rule 12 of the United States Supreme Court Rules.

Assignments of error.

Order allowing appeal.

Notice of appeal.

Petition to the statutory court and order for a stay granted by said statutory court.

Bond perfecting appeal.

Citation.

Statement directing attention to the provisions of paragraph 3 of Rule XII.

Præcipe, dated June 17, 1943.

Dated, July 7th, 1943.

Yours &c., Paul L. Bleakley, Corporation Counsel,
Solicitor for the City of Yonkers.

John J. Broderick, of Counsel.

[fol. 571] To: Clerk of the Supreme Court of the United States, Washington, D. C.; Gray & Whyte, Esqs., Attorneys for Committee of Yonkers Commuters; Robert L. Pierce, Esq., Special Asst. to the Atty. Gen., Department of Justice, Washington, D. C.; Thomas P. Healy, Esq., and Harold H. McLean, Esq., New York Central System, 466 Lexington Avenue, New York City; Daniel W. Knowlton and J. Stanley Payne, Attorneys for Interstate Commerce Commission, Washington, D. C.

[fols. 572-753] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon Gray & White, Esqs., Attorneys for Committee of Yonkers Commuters, 42 Broadway, New York City; Robert L. Pierce, Esq., Special Asst. to the Atty. Gen., Department of Justice, Washington, D. C.; Thomas P. Healy, Esq., and Harold H. McLean, Esq., New York Central System, 466 Lexington Avenue, New York City; Daniel W. Knowlton and J. Stanley Payne, Attorneys for Interstate Commerce Commission, Washington, D. C., who are the attorneys for all the parties herein, by mailing by first class mail a copy thereof, properly addressed to each with charges prepaid.

Dated at Washington, D. C., this 8th day of July, 1943.
James F. White, Jr., Investigator, Office of Corporation Counsel, City of Yonkers.

Sworn to and subscribed before me this 8th day of July 1943, R. de B. Waggaman, Notary Public, D. C. / My commission expires May 15, 1945.
(Seal.)

[fol. 573] [File endorsement omitted.]

[fol. 574] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed
July 2, 1943

1. The appellant, Tooley, above named, pursuant to Rule 13, paragraph 9, herewith sets forth the points upon which he intends to rely, as follows:

I

The Interstate Commerce Commission is without jurisdiction of the subject matter of its abandonment certificate and order of March 20, 1943, herein because the Yonkers Branch is an interurban electric railway which the Record does not show is operated as a part or parts of a general steam railroad system of transportation.

[fol. 575]

II

The Interstate Commerce Commission is without jurisdiction of said subject matter because the Yonkers Branch lies wholly within the boundaries of the State of New York and the Record contains no findings of fact nor evidence sufficient in law to establish jurisdiction thereof in the Interstate Commerce Commission.

III

Where conflict of jurisdiction exists between the Interstate Commerce Commission and a state regulatory body, all doubts must be resolved in favor of the exclusive jurisdiction of the state regulatory body.

IV

The appellants are entitled to a full and fair hearing according to the law of the land upon the application for abandonment under 49 U. S. C., § 1 (18-21), but the requirements of due process of law have been denied to them herein through the arbitrary and capricious action of the Interstate Commerce Commission and by the Statutory Court herein.

2. Appellant, Tooley, designates the following as parts of the record on appeal which he thinks necessary for the

consideration of said points, in addition to those designated by the appellant, City of Yonkers:

(a) Letter dated April 30, 1943, from Robert Moses to Hon. W. P. Bartel marked in evidence before the Statutory Court.

(b) Letter dated June 17, 1941, from John H. Delaney, Chairman, Board of Transportation of the City of New York, to Rexford G. Tugwell, consisting of five sheets, [fol. 576] marked in evidence before the Statutory Court.

Dated: New York, N. Y., July 4, 1943.

Horace M. Gray, Attorney for Appellant, Tooley, 42
Broadway, New York City, N. Y.

[fol. 577]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon Hon. Francis Biddle, Attorney General of the U. S., Attorney for United States, Department of Justice, Washington, D. C. Thomas P. Healy, Esq., Attorney for New York Central System, 466 Lexington Avenue, New York City, N. Y. and Daniel W. Knowlton, Esq., Attorney for Interstate Commerce Commission, 12th Street & Constitution Avenue, Washington, D. C. who are the attorneys for all appellees herein, by mailing by first class mail a copy thereof, properly addressed to each with charges prepaid.

Dated at New York, N. Y., this 1st day of July, 1943.

Horace M. Gray, Attorney for Appellant, Tooley.

[fol. 578] [File endorsement omitted.]

[fol. 579] IN THE UNITED STATES SUPREME COURT

DESIGNATION OF ADDITIONAL PARTS OF RECORD BY APPELLEES—
Filed July 6, 1943

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 13, paragraph 9, of the Supreme Court Rules, designate the following portion of the record to be printed in addition to those portions heretofore designated by appellants:

The following exhibits before the Interstate Commerce Commission in Finance Docket No. 13914:

No. 2—Hagstrom's Map of Manhattan and Bronx;

No. 3—Time Table—Yonkers Branch—Putnam Division;

No. 5—Statement of trains and revenue passengers on Yonkers Branch;

No. 6—Statements of fares on Yonkers Branch;

No. 7—Schedule of Club Transportation Corporation—Park Hill and Nodine Hill operations.

Robert L. Pierce, Special Assistant to the Attorney General, Counsel for the United States.

July 2, 1943.

[fol. 580] To: Clerk of the Supreme Court of the United States, Washington, D. C.; Gray & Wythe, Esqs., 42 Broadway, New York, N. Y.; Thomas P. Healy, Esq. and Harold H. McLean, Esqs., New York Central System, 466 Lexington Avenue, New York City; Daniel W. Knowlton and J. Stanley Payne, Esqs., Attorneys for Interstate Commerce Commission, Washington, D. C.; Paul L. Bleakley, Esq., Corporation Counsel, City Hall, Yonkers, N. Y.

[fol. 581] [File endorsement omitted.]

[fol. 582] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 21, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Roberts and Mr. Justice Douglas took no part in the consideration or decision of this question.

Endorsed on Cover: Enter Horace M. Gray. File No. 47,602. Southern New York, D. C. U. S. Term No. 109. City of Yonkers and John W. Tooley, Jr., as President of Committee of Yonkers Commuters, etc., Appellants, vs. The United States of America, Interstate Commerce Commission and The New York Central Railroad Company. Filed June 19, 1943. Term No. 109 O. T. 1943.

(7833)

FILE COPY

Office - Supreme Court, U. S.

FILED

JUN 19 1943

CHARLES ELMORE CHAPLEY

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS
PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, ETC.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND THE NEW YORK
CENTRAL RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

PAUL L. BLEAKLEY,
HORACE M. GRAY,
Counsel for Appellants.

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STATUTES CITED.

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK (STATE DIVISION, DEPARTMENT OF
PUBLIC SERVICE), CITY OF YONKERS, AND JOHN
W. TOOLEY, JR., AS PRESIDENT OF COMMITTEE OF YON-
KERS COMMUTERS, A VOLUNTARY UNINCORPORATED ASSOCIA-
TION COMPOSED OF MORE THAN SEVEN MEMBERS,

Plaintiffs,

against

UNITED STATES OF AMERICA AND THE NEW YORK
CENTRAL RAILROAD COMPANY,

Defendants.

Civil Action File No. 21-271

**JURISDICTIONAL STATEMENT UNDER RULE XII
OF THE RULES OF THE UNITED STATES SU-
PREME COURT.**

The following statement is made with respect to the
Jurisdiction of the United States Supreme Court to hear
the appeal in this action.

1. The statutory provisions believed to sustain the juris-
diction of the Court are Sections 47 and 47a of Title 28
of the United States Code.

2. The Validity of a Certificate and Order of the Interstate Commerce Commission dated March 20, 1943 in Finance Docket 13914, as extended by its orders dated April 19, 1943 and May 26, 1943 is involved. The Statutes of the United States involved are Sections 1 (18-22 inclusive) of Title 49 of the United States Code and Sections 1 (1) (a-c inclusive); 13; 20a (6), and 17 (6) of Title 49 of the United States Code; the provisions of the Constitution of the United States involved in the appeal are Article I, Section 8, and the Fifth and Tenth Amendments thereof.

3. The Judgment sought to be reviewed was rendered on June 10, 1943 and the petition for appeal therefrom is presented on June 11, 1943.

4. This action was instituted for the purpose of setting aside and annulling the aforesaid orders and certificate of the Interstate Commerce Commission and resulted in a final judgment dismissing plaintiff's complaint which said Judgment is of a nature which is expressly made reviewable by the United States Supreme Court by Sections 47 and 47A of Title 28 of the United States Code. (*Transit Commission v. United States*, 284 U. S. 360; *Colorado v. United States*, 271 U. S. 153.

5. The questions involved in the proposed appeal are substantial in that:

(a) *By reason of the following facts the railroad line which the Interstate Commerce Commission has authorized to be abandoned is a suburban or interurban electric railway not operated as a part or parts of a general railroad system of transportation and consequently the Interstate Commerce Commission has no jurisdiction whatever to pass upon the question of its abandonment (Section 1 (22)) of Title 49 of the United States Code:*

The said application of defendant railroad company to the Interstate Commerce Commission related to the abandonment of service upon a line of electric railway extending generally in a northerly and southerly direction between Getty Square, Yonkers, N. Y., and Sedgwick Avenue, New York City, N. Y., including the abandonment and dismantling of the tracks and electrical and other structures used for the operation of said line between Getty Square, Yonkers, and Van Cortlandt Park Junction, New York City, a distance of 3.1 miles, and the abandonment and dismantling of the electrical structures used for the operation of said line between Van Cortlandt Park Junction, New York City, and Sedgwick Avenue, New York City, a distance of 4.7 miles.

At a point on said electric line 3.1 miles from Getty Square, Yonkers, is the aforesaid junction, known as Van Cortlandt Park Junction, where the tracks of said electric railway connect with tracks also used by the so-called Putnam Division of defendant railroad company between Van Cortlandt Park Junction and Sedgwick Avenue.

The so-called Putnam Division of defendant railroad company is a steam operated line of railway which, after passing northerly over the common trackage used with said electric railway between Sedgwick Avenue and Van Cortlandt Park Junction, proceeds generally in a northeasterly direction as far as Brewster, N. Y., and said Putnam Division carries both passenger and freight traffic.

The so-called Putnam Division of defendant railroad company, north or northeasterly from Van Cortlandt Park Junction, is not electrified, and the electric cars and trains used on said electric line cannot proceed over the Putnam Division northerly or northeasterly from Van Cortlandt Park Junction.

The portion of the electric line from Van Cortlandt Park Junction to Getty Square, Yonkers, used standard gauge

tracks, but the bridges thereon will not support a locomotive drawn train and the steam trains used on the Putnam Division cannot be operated over said portion of the electric line.

Except for said track connection at Van Cortlandt Park Junction for the purpose of using the same trackage for the electric trains of said electric line and for the steam trains of the Putnam Division (between Van Cortlandt Park Junction and Sedgwick Avenue) said electric line has no physical connections whatever for the use of scheduled train service with any other line of railroad operated by the defendant railroad company or by any other railroad company or with any general steam railroad system of transportation.

There are four passenger stations on said electric line within the City of Yonkers, namely: Getty Square, Park Hill, Lowerre and Caryl.

No direct train service is provided by defendant railroad company from any of said stations in the City of Yonkers over the Putnam Division operated by steam northerly or northeasterly of Van Cortlandt Park Junction.

No direct train service is provided by defendant railway company from any part of the Putnam Division operated by steam northerly or northeasterly of Van Cortlandt Park Junction to any of said stations in the City of Yonkers.

Said electric line was built for the purpose of developing suburban business between the City of Yonkers and the City of New York.

Said electric line does not use locomotives, but uses a so-called MU (multiple unit) car which is somewhat in the nature of a trolley car and provides space for carrying passengers as well as supplying motive power.

The trains used on said electric line are comprised of two, three or four cars.

Said electric line carries upwards of 600 passengers each way, daily.

Said electric line is essentially local, operating between the City of Yonkers and the City of New York, and being wholly within the corporate limits of said cities and wholly within the State of New York, and extending for a total distance of 7.8 miles between its northerly terminus at Getty Square, Yonkers, and its southerly terminus at Sedgwick Avenue, New York City.

Said electric line is fundamentally a passenger carrier, is devoted for the most part to commutation service and carries no freight whatever.

There is no evidence that said electric line is engaged in the carriage of interstate commerce to any extent whatever.

The abandonment or continuance of said electric line would not affect or result in any substantial change in the operation of the Putnam Division of defendant railroad company by the use of steam power.

Said electric line is not operated as a part or parts of a general steam railroad system of transportation.

Piedmont & Northern Ry. Co. v. Interstate Commerce Commission, 286 U. S. 299;

United States v. Chicago, North Shore & Milwaukee Railroad Co., 288 U. S. 1, 9-10.

(b) The District Court erred in failing to find and decide that the order of the Interstate Commerce Commission was wholly void and should be set aside because of the lack of basic or essential findings with respect to the jurisdictional question as to whether or not the line between Getty Square, Yonkers and Sedgwick Avenue, New York City, is a suburban or interurban electric railway not operated as a part

or parts of the general steam railroad system of transportation.

(*Florida v. United States*, 282 U. S. 194;

United States v. Baltimore & Ohio R. Co., 293 U. S. 454):

(c) The District Court erred in failing to make any findings of fact and conclusions of law with respect to the issues presented in this action and in deciding and determining that "no findings of fact by us are necessary or appropriate under the circumstances." (Rule 52 of F. R. C. P.)

(d) The District Court erred in finding and deciding that the Interstate Commerce Commission was not required by law to allow plaintiffs a full hearing and that its denial of a further hearing could not be attacked before the District Court.

(e) The District Court erred in failing to find and decide that the plaintiffs were denied a fair and adequate hearing by the Interstate Commerce Commission by reason of the denial of plaintiffs' applications for a further hearing or rehearing sought for the purpose of introducing evidence of materially changed conditions relating to facts found by the Commission as the basis for its determination and for the purpose of introducing newly discovered evidence which was not reasonably discoverable at the time of the original hearing before the Commission by the exercise of due diligence.

(f) The District Court erred in failing to find and decide that the procedure followed by the Interstate Commerce Commission as disclosed upon the trial of this action constitutes a violation of the due process clause of the constitution, said practice being for the Commission to communicate with the War Department with respect to steel scrap and secondhand rails in the absence of the other parties, and with no opportunity to cross-examine or to exclude irrelevant facts.

(g) The District Court erred in failing to find and decide that the reception and consideration of the letter of April 30, 1943 from Robert Moses constituted a violation of plaintiffs' rights to a fair and open hearing, in that said letter was received and considered by the Commission without copies of same having been transmitted to the other parties interested in the proceeding before the Commission in violation of the rules of the Interstate Commerce Commission governing the receipt and consideration by it of such documents.

(h) The District Court erred in failing to find and decide that the Public Service Commission of the State of New York possesses exclusive jurisdiction with respect to the proposed discontinuance of the four stations on said electric line in the City of Yonkers, New York, and with respect to the proposed abandonment of service over said electric line between Getty Square, Yonkers and Sedgwick Avenue, New York City.

(i) The District Court erred in failing to find and decide that the findings made by the Interstate Commerce Commission were insufficient to sustain the conclusion that continued operation of the so-called Yonkers branch would constitute an undue burden upon interstate commerce and upon defendant, The New York Central Railroad Company.

(j) The District Court erred in failing to find and decide that, under the circumstances presented, the estimated annual loss which the Commission found would result from continued operation of said Yonkers branch in the sum of \$56,914, could not as a matter of law constitute an undue burden upon interstate commerce and that the conclusion of the Commission in that respect was arbitrary and capricious.

(k) The District Court otherwise erred as more fully appears in the assignment of errors filed in this action.

Dated June 11, 1943.

PAUL L. BLEAKLEY,
*Corporation Counsel,
Solicitor for the City of Yonkers.*

HORACE M. GRAY,
*Solicitor for John W. Tooley, Jr.,
President of the Committee of
Yonkers Commuters.*

(6818)

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS
PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, ETC.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND THE NEW YORK
CENTRAL RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM ON BEHALF OF APPELLANT, TOO-
LEY, IN OPPOSITION TO MOTION TO AFFIRM.

HORACE M. GRAY,
Counsel for Appellant; Tooley.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1943

No. 109

PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK (STATE DIVISION, DEPARTMENT OF PUBLIC
SERVICE),

Plaintiff;

CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS
PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, A
VOLUNTARY UNINCORPORATED ASSOCIATION COMPOSED OF
MORE THAN SEVEN MEMBERS,

Appellants,

vs.

UNITED STATES OF AMERICA, THE NEW YORK
CENTRAL RAILROAD COMPANY AND INTER-
STATE COMMERCE COMMISSION,

Appellees.

MEMORANDUM ON BEHALF OF APPELLANT, TOO-
LEY, IN OPPOSITION TO MOTION TO AFFIRM.

On March 20, 1943, after a hearing held November 12,
1942, the Interstate Commerce Commission issued its certifi-
cate and order permitting The New York Central Railroad

Company, an appellee, to abandon 3.1 miles of an interurban electric railway 7.8 miles long for the reason that the operating costs at present exceed revenues.

The 3.1 mile section—called the Yonkers Branch—extends from Van Cortlandt Park Junction in New York City to Getty Square in Yonkers, New York. The balance of the electric line extends from Van Cortlandt Park Junction to Sedgwick Avenue, New York City, and parallels the Hudson Division of the New York Central Railroad south from University Heights.

The abandonment of the Yonkers Branch would also result in the discontinuance of all the electric service to Sedgwick Avenue.

The steam line of the Putnam Division of the N. Y. Central extends north from Van Cortlandt Park Junction to Brewster, New York. It runs steam trains over the electric line from Van Cortlandt Park Junction to Sedgwick Avenue.

The trains run on the electric line are made up of two to four light M. U. (multiple unit) cars "like trolley cars" operated on a third rail.

The electric cars cannot operate on the steam line north of Van Cortlandt Park Junction.

The steam trains cannot operate on the Yonkers Branch because the bridges are too light to bear a steam locomotive.

No freight of any kind is carried on the Yonkers Branch. Its business is solely passenger traffic, predominantly commuting.

The record shows no passenger tickets sold at the stations on the Yonkers Branch to any point outside New York State. All its traffic is between Yonkers and New York City, which cities are adjacent to each other.

The Yonkers Branch lies wholly within the State of New York and all its business is intrastate.

After the order of the I. C. C. was made these appellants filed timely motions for a rehearing and reargument upon the ground of newly discovered evidence and changed traffic conditions—which need not be detailed here—and claimed that under § 1 (22) of the Interstate Commerce Act (49 U. S. C.), the Interstate-Commerce Commission is without jurisdiction of the subject matter.

In its decision upon which its order of March 20, 1943, was based, the I. C. C. had made no findings of fact that support it in assuming jurisdiction of the subject matter. It denied the petition for rehearing and still made no findings to support its jurisdiction.

This suit was then commenced under §§ 41-47, Title 28 U. S. C., to vacate the certificate and order upon the general grounds that:

1. The I. C. C. was without jurisdiction of the subject matter for two reasons—which will be discussed *post*.

2. The proceedings before the I. C. C. did not constitute due process and violated the Fifth Amendment to the Constitution.

The merits were tried to a Statutory Court on June 2, 1943, and it entered its order on June 10, 1943,—without the findings required by Rule 52, F. R. C. P.—sustaining the I. C. C. and holding that these appellants were not entitled to any hearing before the I. C. C., and, therefore, were not entitled to a rehearing.

These appellants, The City of Yonkers, and John W. Tooley, Jr., as President of a Committee of Yonkers Commuters, who had been parties in all the proceedings above described now appeal to this Court under 28 U. S. C. § 47 and pray a stay of the I. C. C. order pending the hearing and determination of the appeal. The matter of appeal by the State of New York is now before Governor Dewey.

Questions Presented.

Two important matters are involved in this appeal:

1. The conflict of jurisdiction between the I. C. C. and the Public Service Commission of the State of New York.
2. Violation of due process in the proceedings.

Conflict of Jurisdiction.

The Yonkers Branch presents a matter of purely local transportation and, *prima facie*, falls within the exclusive jurisdiction of the State P. S. C.

The P. S. C. is qualified to deal with it and is much more intimately familiar with local conditions and local problems than the I. C. C.

If the carrier feels itself aggrieved by the action of the P. S. C. it may have recourse to the courts of the State of New York and this Court may review by certiorari if so disposed.

No valid reason appears why such controversies should be thrown into the Federal Courts by reason of efforts of the I. C. C. to extend its jurisdiction beyond the plain language of the Act.

Interference by a federal agency with the internal affairs of a state are not encouraged by this Court.

This Court said in *Palmer v. Mass.*, 308 U. S. 79 at pages 84-5:

"Therefore, in construing legislation this Court has disfavored in-roads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. (cases)"

"The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the State. Even when the Transportation Act of 1920, 49

U. S. C. A. § 1 (18-20), gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado v. U. S.*, 271 U. S. 153, this was not deemed to confer upon the Commission jurisdiction over curtailment of service and *partial discontinuances*." (Italics supplied)

This Court said in *Florida v. U. S.*, 282 U. S. 194, at pages 211-12:

"The propriety of the exercise of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear. *Illinois C. R. Co. v. State Public Utilities Commission*, 245 U. S. 493." (Italics supplied)

The I. C. C. may not acquire jurisdiction of this inter-urban electric line unless it is

"operated as a part or parts of a general steam railroad system of transportation" (§ 1 (22) 49 U. S. C.)

even though it had crossed state lines.

The I. C. C. has made no finding that this branch falls within that statutory category. The record would not support such a finding if it had been made.

The absence of that foundation is fatal to the validity of its order.

This question of jurisdiction is one of mixed fact and law and the determination of the I. C. C. is open to review by the Courts.

U. S. v. Idaho, 298 U. S. 105, 109.

The Statutory Court in its opinion referred vaguely to unenumerated "significant facts" upon which it based its

affirmance but made no finding adequate to form a basis for jurisdiction in the I. C. C. under § 1 (22).

No evidence was introduced before the Statutory Court on this feature that was not before the I. C. C.

There is no pronouncement by this Court that we have been able to find purporting to define what constitutes operation of an electric interurban line "as a part or parts of a general steam railroad system of transportation".

A definition of an interurban electric railway is to be found in the case of *Piedmont & Northern R. Co. v. I. C. C.*, 286 U. S. 299, at page 307. The Yonkers Branch falls squarely within that definition.

The Branch itself has no connection at all with the New York Central system but its passengers may transfer to the Hudson Division—as from a trolley car—at University Heights or Highbridge, but these points are below Van Cortlandt Park Junction. Or they may continue to the electric terminus at Sedgwick Avenue and there transfer to the shuttle connection with the New York City subway system.

"Operation" does not mean ownership but "would relate to methods of railroad transportation" (*Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 180).

The New York Central System was complete before it acquired and absorbed the Yonkers Branch as a competing passenger service wholly separate and distinct from its own trackage and traffic (See Answer to Question 2A in N. Y. Central Answers to Questionnaire, attached to complaint as part of Exhibit A.)

The abandonment of the Yonkers Branch would have no physical effect upon the operation of the New York Central railroad system and could have no effect upon interstate commerce—with which the I. C. C. is alone concerned.

Assumption of jurisdiction in this case where the line does not "interchange standard freight equipment with

steam railways and participate in through interstate freight rates with such carriers" is totally at variance with the settled administrative interpretation referred to in *U. S. v. Chicago, North Shore & Milwaukee R. R. Co.*, 288 U. S. 1, at pages 12-14.

The I. C. C. in its report therein referred to suggested the inclusion of *all electric railways* into the category of inter-urban electric lines.

Unless the I. C. C. has jurisdiction under § 1 (22) the second jurisdictional question does not survive.

That question is whether the alleged annual operating deficit of some \$56,000 constitutes an "undue" burden on interstate commerce.

The existence of an "undue" burden is a jurisdictional question upon which the I. C. C. passes. In the absence of "undue burdens or discrimination" (*Colorado v. U. S.*, 271 U. S. 153, at page 162) the jurisdiction over the matter rests with the State regulatory body, in this case the Public Service Commission of the State of New York.

In the case at bar the I. C. C. has found an estimated annual loss of \$56,941 on the basis of the years 1940 and 1941 although the record shows that traffic is increasing and Division IV of the I. C. C. so found. The appellants asked an opportunity to show that this alleged loss can be materially reduced if not wholly eliminated but its petition was denied by the Commission.

The mere existence of an operating deficit is not enough. (See *I. C. C. v. Oregon-Washington R. & Nav. Co.*, 288 U. S. 14 at page 37). The State authority cannot be ousted until the deficit amounts to an "undue" burden on interstate commerce. The carrier is now making a net profit after taxes of nearly \$6,000,000 per month and its net revenue has been steadily increasing month by month for the past year.

This Court held in *New York & Queens Gas Co. v. McCall*, 245 U. S. 345 at page 351 that a public utility may not "pick and choose" to avoid unprofitable territory.

When the jurisdiction of the I. C. C.—which is a mixed question of fact and law—depends upon its own determination this Court should require that the record include a substantial factual basis in the form of evidence and findings of fact to support its determination of jurisdiction.

It is too much to expect a government bureau to curtail its field of endeavor by resolving doubts as to its jurisdiction against itself particularly if the basis of its decision may be shrouded in generalities.

Therefore the ultimate finding of an "undue" burden should be supported by findings of the facts upon which the conclusion is based. That is part of due process. Only thus may the people and the states be protected against otherwise uncontrolled, arbitrary and capricious exercise of power. The Tenth Amendment to the Constitution must mean something. Without some yardstick to measure the proper exercise of power by the Commission, the public and the railroads are at the mercy of some whim of temporary policy.

This Court said in the *Colorado* case at p. 166:

"The authority to *find the facts* and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission". (Italics supplied)

There are no findings in this record of any facts indicating that the Yonkers Branch creates an "undue" burden on interstate commerce and no evidence in the record that it even creates a burden. All expert opinions proceed upon a factual foundation, and no exception seems called for in the case of an expert Commission.

Without any rein upon the Commission it might well use the magic words "undue burden" to muscle in on most of

the internal transportation affairs of every state in the Union and throw the litigation thereby engendered into the Federal courts where it does not belong.

LACK OF DUE PROCESS.

The Statutory Court held on the strength of *Woodruff v. U. S.*, 40 Fed. Supp. 949, that these appellants were not entitled of right to any hearing before the I. C. C. and therefore their petitions for rehearing to show:

1. That the N. Y. Subway system would be extended after the war to Sedgwick Avenue and that the prosperous traffic conditions existing before the removal of the Sixth and Ninth Avenue El's would thus be restored;
2. That Yonkers city taxes on the right-of-way would be substantially reduced with consequent saving to the carrier;
3. That taxes paid the City of New York on the right-of-way in Van Cortlandt Park could reasonably be reduced were properly rejected.

The law under the Fifth Amendment requires a hearing before the rights of any individual may be injuriously affected (See *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 182).

Section 1 (19) of the Interstate Commerce Act provides for rules and regulations for "hearings" and for advertisement of the proceeding. Congress certainly contemplated hearings by the I. C. C. Congress itself is subject to the Constitution. Its creature, the I. C. C. cannot exercise powers and prerogatives denied its creator.

Appellants also claim that the communication with the War Department by the I. C. C. as to the former's need for scrap steel after the subject had been excluded at the hearing—and in the absence of the parties in interest—is a gross violation of the due process clause.

Similarly the acceptance by the Commission of a letter from Mr. Moses raising an issue as to the subway extension without notice to the parties and in violation of the Commission's Rule 22 requiring notice constitutes another grave violation of due process. The issue so raised was summarily decided against the appellants without a hearing by the denial of a rehearing.

THE STAY.

Irreparable injury would result to the appellants if the carrier were at liberty to tear up its tracks while this appeal is under consideration.

The loss of time and money and the heavy inconvenience that would be suffered by the commuters on the line—between 600 and 800—greatly outweigh any loss the carrier might suffer in the interim.

The doctrine of comparative injury recognized in

Prendergast v. N. Y. Telephone Co., 262 U. S. 43, 51 and
Allison v. Corson, (CCA 8) 88 Fed. 581, 584

we think is applicable here.

Conclusion.

The motion for affirmance should be denied and the stay *pendente lite* requested should be granted.

Respectfully submitted,

HORACE M. GRAY,

Attorney for Appellant, Tooley.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 109

Civ. 21-271.

PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK (STATE DIVISION, DEPARTMENT OF PUBLIC
SERVICE), CITY OF YONKERS, AND JOHN W. TOOLEY,
JR., AS PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS,
A VOLUNTARY UNINCORPORATED ASSOCIATION COMPOSED OF
MORE THAN SEVEN MEMBERS,

Plaintiffs,

against

UNITED STATES OF AMERICA AND THE NEW YORK
CENTRAL RAILROAD COMPANY,

Defendant.

MEMORANDUM.

This is an application for an order staying and suspending the operation, execution and enforcement of the certificate or order of the Interstate Commerce Commission dated March 20th, 1943 in Finance Docket #13914 as extended by its orders dated April 19th, 1943 and May 28th, 1943 and restraining and enjoining the defendant, New York Central Railroad Company and all persons from taking any action in pursuance of said orders and certificates of the Interstate Commerce Commission and from in any

manner abandoning or attempting to abandon or curtailing or attempting to curtail its present operation of its so called Yonkers Branch until the hearing and determination of the United States Supreme Court of the appeal which has been taken by said plaintiffs from a final judgment of the United States District Court for the Southern District of New York rendered on June 10th, 1943. We are informed that the counsel for defendant, United States of America, will make a motion to affirm the judgment of the court below. We oppose said motion.

The appeal herein has been perfected.

The judgment appealed from was the opinion of the United States Statutory Court found in Schedule I of our petition. It was filed on June 10th, 1943. The opinion stated "no findings by us are necessary or appropriate under the circumstances".

On June 11th, 1943, the next day after the judgment was filed an application was made to the said Statutory Court for an order for a temporary stay pending the application of the plaintiffs for an order for a stay to the United States Supreme Court or one of the justices thereof pending the hearing and determination of the appellant's appeal to that court. This temporary stay was granted until June 12th, 1943 midnight in order to give plaintiffs an opportunity to make said application. We are now in this court seeking relief asked for in our petition and at the same time opposing the motion to affirm made by the defendant, United States of America.

The facts in this case as we view them are substantially as follows:

The above entitled proceeding was instituted by an application of the New York Central Railroad Company under appropriate paragraphs of Section 1 of the Interstate Commerce Act for a certificate that the present and future

public convenience and necessity permit of the abandonment by the New York Central Railroad Company of a line of railroad between Van Cortlandt Park Junction, New York City in the County of Bronx and Getty Square, Yonkers in the County of Westchester, State of New York.

The City of Yonkers appeared at a hearing on this application held in City Hall, Yonkers, New York, on November 12th, 1942 as a protestant against said application and as such protestant opposed the said application. After said hearing and on about February 8th, 1943, a proposed report was filed by Lucian Jordan, one of the examiners for the Commission, in which said proposed report he recommended that the application of the New York Central Railroad Company for the abandonment of said line should be granted.

On or about the 13th day of February, 1943, the City of Yonkers, New York, as a protestant excepted to the report an order proposed by said Examiner Jordan which exceptions were duly filed. A hearing was held by the Interstate Commerce Commission, Division 4, as to City report at its office in Washington, D. C. on the 3rd day of March, 1943 on which day our argument was heard as to said City report and a transcript of that record is incorporated in our complaint in this action and marked Exhibit H by reference.

On or about the 20th day of March, 1943, the said Interstate Commerce Commission, Division 4, consisting of Commissioners Porter, Mahaffie and Miller filed their report and issued a certificate or order directing the abandonment of said line and further ordered in said certificate or order that the abandonment should take effect and enforced from the date set forth in said order or certificate.

The City of Yonkers on the 17th day of April, 1943 as a protestant filed a petition with the said Commission for a review, rehearing and reconsideration and reargument of said order and also that the order of the Interstate Com-

merce Commission be stayed to a later date, that the execution of the first order was extended by orders dated April 19th, 1943 and May 29th, 1943. In May 10th, 1943, the Interstate Commerce Commission made its order denying the petition for rehearing without allowing the protestants to appear at said hearing. Subsequent orders suspending the abandonment of the line were made and finally a temporary stay was granted by the United States District Statutory Court until Saturday, June 19th, 1943 at midnight.

The plaintiffs instituting this suit were listed as parties and appeared in all of the proceedings before the Interstate Commerce Commission.

The plaintiff, City of Yonkers, sues on behalf of itself and its inhabitants. It is their claim and it is a fact that they would be irreparably damaged by the abandonment of said line. The branch which the defendant, the New York Central Railroad, proposes to abandon is called Yonkers Branch, Putnam Division, New York Central Railroad Company, and is an electric railway and is commonly known and designated by the defendant railroad company as the "Yonkers Branch." Its northerly terminus is at Getty Square in the City of Yonkers, from whence it proceeds generally in a southerly direction through the City of Yonkers to the boundary line between the City of Yonkers and the City of New York, where it enters Van Cortlandt Park in the City of New York and continues generally in a southerly direction within the City of New York to the southerly terminus of said line of railway at Sedgwick Avenue, New York City. The distance between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is 7.8 miles.

At a point on said electric railway, 3.1 miles from Getty Square in Yonkers, there is a junction, known as Van Cortlandt Park Junction, where the so-called Putnam Division of the defendant railroad company joins said electric rail-

way. From that point southerly to the Sedgwick Avenue terminus the steam trains of the Putnam Division operate over the same tracks as the electric railway. Northerly from Van Cortlandt Park Junction, the Putnam Division proceeds in a northeasterly direction as far as Brewster, N. Y., while the so-called Yonkers Branch proceeds in a northwesterly direction to Getty Square, Yonkers.

The trains of the Putnam Division are operated by steam (not electricity), and the Putnam Division is not electrified. Therefore, the electric trains of defendant railroad company which operate over the electric railway in question are not and cannot be operated over the Putnam Division; such electric trains are operated only between Getty Square, Yonkers, and Sedgwick Avenue in New York City. The line of said electric railway, and that of the Putnam Division, are shown upon the map attached to defendant railroad company's application to the Interstate Commerce Commission (Ex. A.).

In connection with its application to the Interstate Commerce Commission, defendant railroad company stated:

"The line of railroad sought to be abandoned was constructed partly by Yonkers Rapid Transit Railway Company and The Yonkers Rapid Transit Railway Company and was completed by the New York and Northern Railway Company in 1888. *The branch was built for the purpose of developing suburban business between the City of Yonkers and the City of New York.*" (Ex. A, Return to Q. p. 2).

The line was electrified in 1926, and, in the words of a witness for the railroad company, "it was expected that a greater number of people having their business in New York City would reside in Yonkers and utilize the electric service to travel back and forth to business." (S. M. 12).

The electric trains are comprised of two, three or four cars, including the hauling car which is not a locomotive.

but is an "MU" (multiple unit) car. In addition to supplying the means of locomotion for the train the MU car has provision for carrying passengers of its own—it is "somewhat in the nature of a trolley car." (S. M. 53) The structure of the line is such that locomotives cannot be used thereon, and the line carries no freight whatever. In the words of the railroad company's witness: "You have got a line that is built primarily for commuter passenger business." (S. M. 52-54)

The line carries over 600 passengers (each way) daily at the present time.

The stenographic minutes and exhibits referred to above are in the record of the Interstate Commerce Commission.

For fifty-five years the said railroad performed the function for which it was constructed, namely the development of suburban business between the City of Yonkers and the City of New York.

In the year 1890 the population of the City of Yonkers was 32,033. The present population of the City of Yonkers is 142,000.

The part of the railroad proposed to be abandoned within the confines of the City of Yonkers has four stations, namely, Caryl, Lowerre, Park Hill and Getty Square.

In the course of these fifty-five years prosperous suburban real estate developments have been built up around these stations: There is a very large development around said Caryl Station. In addition to purely suburban and residential properties, large apartment houses have been erected in that section as well as stores and other business buildings. The same may be said about the growth of the City of Yonkers around the Lowerre Station. This is known as the Lowerre Section of the City of Yonkers and in this section are suburban homes, large apartment houses and many substantial business places, churches and schools.

The next station is that known as Park Hill. The Park Hill Section on the easterly side of the railroad is purely residential and considered one of the most pretentious real estate developments in the City containing many substantial residences and is almost a community in itself, having its own social life centered around what is known as the Park Hill Country Club. The next station is Getty Square. This station is in the heart of the City of Yonkers and in Getty Square so-called are the largest and most pretentious buildings in the City. It contains all the main bank buildings and other business buildings. In recent years the Getty Square Station is contained in the First National Bank Building. This building also contains the main offices of the First National Bank. The upper floors are used for offices. It can be safely said that Getty Square is the hub and business center of the City of Yonkers.

This proposed abandonment would interrupt the orderly process of life of a large proportion of the people in these local communities mentioned for they have depended for many years in a large measure on the railway service furnished by the railroad which the defendant, New York Central Railroad Company, proposes to abandon. These local communities would not only lose this railroad service, but in addition they would lose large sums in real estate values which would affect every property owner within the vicinity of this railroad proposed to be abandoned, and the resultant effect would be that the plaintiff, City of Yonkers, would also suffer great loss by reason of the diminution and loss of taxes.

The Jurisdictional Question Involved.

The jurisdiction of the Interstate Commerce Commission with respect to abandonments is found in Section 1, subdivisions 18 and 22, of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, subds. 18, 22).

Subdivision 18 of Section 1 provides, in part, that:

"no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

This broad grant of authority is specifically limited by subdivision 22 of Section 1, which provides as follows:

Sec. 1, par. (22) *Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of *street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.*"

The report of Division 4 (Complaint Ex. I) shows that the Interstate Commerce Commission made no findings whatever with respect to the question of whether this line is a "suburban, or interurban electric railway * * * not operated as a part or parts of a general steam railroad system of transportation," which is specifically excluded by statute from the jurisdiction of said Commission with respect to approval of its abandonment (28 U. S. C. A. Sec. 1, subd. 22).

If the line in question is a "suburban or interurban railway" as defined in subdivision 22 of Section 1 of the Constitution, the Interstate Commerce Commission has no jurisdiction to authorize its abandonment. Therefore, the Certificate and Orders of the Commission are null and void.

No findings were made by the Commission itself as to whether or not this line between Getty Square, Yonkers,

and Sedgwick Avenue, New York City, is a suburban or interurban electric railway and no finding was made as to whether or not the line is "operated as a part or parts of a general steam railroad system of transportation". This question was specifically called to the attention of the Commission before it finally acted in this matter (Exhibits X, L, M, our Bill of Complaint).

In any event when jurisdiction is not waived it is elementary that it can be raised at any time.

The United States District Statutory Court made no findings either on this question, although we believe it is required to do so even if it dismissed the Complaint on the merits.

In the entire record there is no one solid finding of fact stating just what type of railway this is.

In the cases in this Court we have read on this question, in relation to subdivision 22 of Section 1 of the Interstate Commerce Act, that there has always been a finding by the Interstate Commerce Commission as to whether or not the railway in question came within or without the statute.

* As was said in *Florida v. United States*, 282 U. S. 194:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination * * * but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

The Commission before it proceeded should have first considered whether it had jurisdiction or not.

United States v. Baltimore & Ohio R. Co., 293 U. S. 454.

Apart from that contention, we submit it is clear from the record made before the Interstate Commerce Commission that if it did find it had jurisdiction such a finding would have been wholly without substantial evidence to support it; and that, upon the undisputed facts as disclosed by such record, the line in question falls within the exception to the jurisdiction of the Commission as contained in subdivision 22 of Section 1 of the Interstate Commerce Act. In a case involving the question of whether an abandonment authorized by the Interstate Commerce Commission constituted a "spur" within the meaning of the very statutory provision involved in this case, the Supreme Court said:

"Whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a State commission." (*United States v. Idaho*, 298 U. S. 105, 109)

In *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission* (286 U. S. 299) the Court described a "suburban or interurban electric railway" in terms which are peculiarly significant and applicable to the facts of this case, as follows:

"No difficulty is encountered in defining a street or a suburban electric railway. These are essentially local, are fundamentally passenger carriers, are to an inconsiderable extent engaged in interstate carriage, and transact freight business only incidentally and in a small volume. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distinct communities, and that in addition so-called interurban lines were constructed

from time to time, to serve the convenience of two or more cities. *But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars. Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads.*"

In the present case, it will be noted that *no freight whatever* is carried by the line in question. It is solely a passenger line—" * * * You have got a line that's not built for freight. You have got a line that is built primarily for commuter passenger business" (S. M. 54 Hearing before Commission). There is no evidence in the record made before the Commission that it is engaged to *any extent whatever in interstate commerce*. It is "essentially local" and carries passengers between the four stations in the City of Yonkers, to stations in the City of New York. It is operated by "single or series self-propelled cars"—The "MU" car, and the undisputed evidence shows that ordinary locomotives cannot be operated over the line—"As I say, these bridges are too light for a locomotive." (S. M. 54, Hearing before Commission).

See

U. S. v. Chicago, North Shore & Milwaukee Railroad Co., 288 U. S. 1, 9-10.

We think there can be no question that, tested by the criteria referred to by the Supreme Court, this line is a "suburban or interurban electric railway" within the meaning of subdivision 22. The fact that the line was not originally constructed as an "electric railway," is, we submit, immaterial. So far as "abandonment" is concerned, the statute relates to *presently existing* "suburban or inter-

urban railways" and there is nothing in the statute or in the decisions thereunder which purports to limit its application to railways which were originally constructed as electric railways. It might be urged that the line proposed to be abandoned is not individually owned and is the property of the New York Central Railroad Company. The cases seem to hold that the question of a single ownership is not controlling interpreting the statutes involved herein.

In the development of transportation, steam railways, of course, preceded electric railways. When subdivision 22 was first enacted in 1920 (Transportation Act of 1920, c. 91, Sec. 402, 41 Stat. 478) there were undoubtedly in existence electric railways of the described class which were originally operated by steam and had later been converted to electricity when that source of motive power was introduced. Certainly no one would contend that such electric railways were not within the purview of subdivision 22 at the time of its enactment in 1920. Nor can it be said that subdivision 22 applies only to electric railways which were in existence at the time of its enactment. Such a construction would exclude electric railways thereafter constructed, contrary to the manifest intention of the Legislature to exclude from the jurisdiction of the Commission *all* electric railways within the described class. When the line in question was electrified in 1926 the effect thereof, so far as the statutory provision is concerned, was exactly the same as though an entirely new line was constructed. Thereafter the line constituted a "suburban or interurban electric railway" and the provision in question became applicable thereto.

But one further question remains—is the line "*operated*" as a *part* or parts of a general steam railroad *system of transportation*"? We submit that this phrase relates to the situation where the "suburban or interurban electric railway" is an integral link in a steam railroad "system."

the construction or abandonment of which would constitute an "extension" of such "steam railroad system of transportation" or an "abandonment" *pro tanto* of such "steam railroad system of transportation."

The so-called "Hudson Division" of the defendant railroad company affords an example. That division is a part of the line of the railroad between New York and Chicago. It is electrified from New York to Harmon, and passes through the City of Yonkers. An abandonment of the portion of that line between New York City and Yonkers would constitute an abandonment of a "portion of a line of railroad" within the meaning of subdivision 18 of Section 1 of the Interstate Commerce Act and although such portion is an "electric railway" running between the City of Yonkers and the City of New York and is, therefore, "interurban," it is also obviously "operated as a part or parts of a *general steam railroad system of transportation*" and, therefore, is not within the exception provided for in subdivision 22.

The so-called "Yonkers branch," on the other hand, is not "operated as a part" of defendant railroad company's Putnam Division or of any "general steam railroad system of transportation," albeit the Yonkers Branch and the Putnam Division trains pass over the same trackage as far as Van Cortlandt Park junction. The trains of the "Yonkers branch" *cannot* pass over the Putnam Division to Brewster, because that line is not electrified beyond Van Cortlandt Park Junction; the Yonkers branch trains proceed *only* to Getty Square, Yonkers. Conversely the trains of the Putnam Division, which are drawn by steam locomotives, *cannot* proceed over the Yonkers branch to Getty Square, because the bridges on the electric line will not carry the locomotives.

The electric railway in question is not in any real sense operated as a "part" of the Putnam Division. It is a

"commuters line" admittedly designed for the specific purpose of carrying commuters between their homes in Yonkers and their places of business in New York City. If the line were abandoned the Putnam Division would continue to operate as it has in the past, and the abandonment would not interfere in the slightest degree with such operation. On the other hand, service on the Putnam Division—the "general steam-railroad system of transportation"—could be discontinued, and the "Yonkers branch," from Sedgwick Avenue, New York, to Getty Square, Yonkers, being electrified, could continue in operation. The two lines are wholly independent except for the fact that for a distance of approximately 4.7 miles they use the same track. That fact, we submit, is wholly immaterial; the situation, for the purposes of the statutory provision involved, is exactly the same as though a separate line of track, paralleling the existing track, were installed to carry the electric railway trains.

In this connection it is to be observed that mere physical connection and interchange of traffic with a "general steam-railroad system of transportation" does not take a line out of the exception provided by subdivision 22. Thus in *United States v. Chicago North Shore & Milwaukee R. Co.* (288 U. S. 1) the Court held the railway there involved to be without the jurisdiction of the Interstate Commerce Commission under Section 20-a of the Interstate Commerce Act (which relates to the issuing of securities and contains a similar provision) despite the existence of facts which the Court stated, in part, as follows:

"Twenty fast through passenger trains are operated daily in each direction between downtown Chicago and downtown Milwaukee with a running time equally that of the fastest trains of the Chicago and Northwestern Railway . . . Dining cars and parlor cars are included in some of the appellee's fast trains. Modern, well equipped passenger stations are main

tained at a number of points; 51 have agents selling passenger tickets; at some 96 places shelters and platforms are maintained, at 35 platforms only; and at 42 locations at which certain trains stop at streets or highways no facilities are provided. *Through railroad and Pullman tickets are sold to any part of the United States, Canada or Mexico. Local passenger fares are computed on the mileage bases used by steam railroads.*"

Nevertheless, the Supreme Court held that the line was an "interurban electric railway which is not operated as a part of a general steam railroad system of transportation" under Section 20 a, and in so holding the Court referred to subdivision 22 of Section 1 "which," the Court said, "is couched in the same words as the exception in Section 20 a (1)."

We are aware of the fact that in a later proceeding the Interstate Commerce Commission found that the above mentioned Chicago, North Shore & Milwaukee line was not an interurban railroad and its decision was affirmed by a Federal Court (See 122 Fed. 2d, page 128). In this later proceeding the Commission made a specific finding of fact as to the status of the railroad case in question.

In the case at bar, as we have already pointed out, there is no finding whatever as to the status of the Putnam Division, New York Central Railroad.

These contrary decisions do not unnecessarily disturb us, for, as Judge Roberts said in the *Chicago, North Shore & Milwaukee Railroad Company* case, 288 U. S., at page 11:

"As indicated in the *Piedmont & N. R. Co.* case, supra, the phrase 'interurban electric railway' may not in all circumstances be susceptible of exact definition. The Commission has realized the difficulty."

Mr. Justice Roberts then goes on to cite examples as to the uncertainty of the Interstate Commerce Commission as

to the meaning of subdivision 22, paragraph 1 of the Interstate Commerce Act.

We believe, in the first place, that the Interstate Commerce Commission had no jurisdiction over the line proposed to be abandoned. In the second place, that if it had it should have made a proper finding of fact that it had jurisdiction, so that the question of its jurisdiction could be properly raised. In the third place, we believe that the United States District Statutory Court erred in assuming that the Interstate Commerce Commission had jurisdiction in this case and, if that Court believed that the Commission had jurisdiction, it should have made an appropriate finding to that effect.

As already pointed out, the proposed abandonment of this line means a curtailment of local service and the discontinuance of four of its stations in the City of Yonkers, namely, Caryl, Lowerre, Park Hill and Getty Square. If there is no overriding interest of interstate commerce, the power to regulate purely local service and discontinue stations is within the State. (See Section 54 of the Railroad Law of the State of New York, as amended.) (Chapter 43 of the New York Consolidated Laws).

As said in the case of *Palmer v. Massachusetts*, 308 U. S. 79-90, in an opinion written by Mr. Justice Frankfurter, pages 83, 84 and 85:

"Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates

one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 US 352, 57 L ed 1511, 33 S Ct 729, 48 LRA (NS) 1151, Ann Cas 1916A 18; cf. *Kelly v. Washington*, 302 US 1, 82 L ed 3, 58 S Ct 87.

The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states. Even when the Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado v. United States*, 271 US 153, 70 L ed 878, 46 S Ct. 452, this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuances. *Re Kansas City S. R. Co.*, 94 Inters Com Rep 691; see *Re Morris & E. R. Co.*, 175 Inters Com Rep 49."

Our papers for an order for a stay show that the Plaintiff, City of Yonkers, will be irreparably damaged and suffer great hardship if the line is abandoned.

We, therefore, pray that under all the circumstances, first, that the motion for affirmance be denied, and, second, that an order for an application for a stay be granted pending the hearing and determination of the appeal taken by us to the Supreme Court of the United States.

Respectfully submitted,

PAUL L. BLEAKLEY,
Corporation Counsel, City of Yonkers,
Solicitor for Plaintiff, City of Yonkers.

LEONARD G. MCANENY,
JOHN J. BRODERICK,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 109.

CITY OF YONKERS and JOHN W. TOOLEY, JR., as
PRESIDENT OF COMMITTEE OF YONKERS COM-
MUTERS, etc.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION and THE NEW YORK
CENTRAL RAILROAD COMPANY.

BRIEF OF APPELLANT, CITY OF YONKERS.

PAUL L. BLEAKLEY

JOHN E. BRODERICK

Counsel for Appellant

City of Yonkers

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Supreme Court of the United States

OCTOBER TERM 1943

No. 109

CITY OF YONKER and JOHN W. TOOLEY,
JR., AS PRESIDENT OF COMMITTEE OF
YONKERS COMMUTERS, ETC.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, IN-
TERSTATE COMMERCE COMMISSION and
THE NEW YORK CENTRAL RAILROAD
COMPANY.

Appeal from a Final Judgment of a Special United States Statutory
District Court for the Southern District of New York Rendered
on June 10th, 1943, at New York, N. Y.

BRIEF OF APPELLANT CITY OF YONKERS.

This is an appeal from a final judgment of a special United States District Court, Southern District of New York, rendered on June 10th, 1943, which denied appellants and Public Service Commission of the State of New York—State Department of Public Safety—, dismissing the complaint upon the merits, a permanent injunction to enjoin and set aside a certificate and order of the Interstate Commerce Commission authorizing The New York Central Railroad Company to abandon part of a line of railway between Van

Cortlandt Park Junction, New York, New York, and Getty Square, Yonkers, New York of approximately 3.1 miles

Opinion Below.

The opinion of the United States Statutory District Court for the Southern District of New York is in transcript of record (R. 385). Also judgment (R. 385).

Jurisdiction.

The Court below granted a temporary stay pending appellants' application for a temporary stay to this Court pending an appeal to this Court which had been perfected. (R. 388). Application was thereafter made to this Court for such temporary stay, and at the same time a motion was made on behalf of the United States of America to affirm the judgment of the Court below.

On June 21, 1943, an order was entered noting probable jurisdiction. (R. 400). See also statement as to jurisdiction filed with this Court dated June 14, 1943, and printed. The motion for a temporary stay was denied and also the motion to affirm.

Questions Presented.

(1) Whether the railroad sought to be abandoned here by the New York Central Railroad Company is a suburban or interurban electric railway and as such is not operated as a part or parts of a general railroad system of transportation and whether the Interstate Commerce Commission had jurisdiction or power to direct abandonment, and

(2) Whether the operating loss sustained by the New York Central Railroad Company constituted such an undue

burden on interstate commerce as to confer jurisdiction on the Interstate Commerce Commission, and

(3) Whether the loss constituted such an overriding interest of interstate commerce so as to give the Interstate Commerce Commission jurisdiction instead of The New York State Public Service Commission although the proposed abandonment, consisting of only 3.1 miles, is only a curtailment of purely local service and the discontinuance of four railroad stations in the City of Yonkers and

(4) Whether the appellant City of Yonkers would be irreparably damaged by the abandonment of this line.

Statement.

The above entitled proceeding was instituted by an application of the New York Central Railroad Company to the Interstate Commerce Commission for a certificate that the present and future public convenience and necessity permit of the abandonment by the New York Central Railroad Company of part of a line of railroad between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York. The part of the railroad which the New York Central seeks to abandon is marked in red on map. (R. 346).

The City of Yonkers appeared at a hearing on this application held in City Hall, Yonkers, New York, on November 12th, 1942 as a protestant against said application and as such protestant opposed the said application. (R. 176). After said hearing and on or about February 8th, 1943, a proposed report was filed by Lucian Jordan, one of the examiners for the Commission, in which said proposed report he recommended that the application of the New

York Central Railroad Company for the abandonment of said line should be granted. (R. 36).

On or about the 13th day of February, 1943, the City of Yonkers, New York, as a protestant excepted to the report and order proposed by said Examiner Jordan which exceptions were duly filed. (R. 37). A hearing was held by the Interstate Commerce Commission, Division 4, as to said proposed report at its office in Washington, D. C., on the 3rd day of March, 1943, on which day oral argument was heard as to said report and a transcript of that record is incorporated in our complaint in this action and marked "Exhibit H" by reference. (See also R. 366).

On or about the 20th day of March, 1943, the said Interstate Commerce Commission, Division 4, consisting of Commissioners Porter, Mahaffie and Miller, filed its report (R. 71 to 78) and issued a certificate or order (R. 78) directing the abandonment of said line and further ordered, in said certificate or order that the abandonment should take effect and enforced from the date set forth in said order or certificate, viz., April 29, 1943.

The City of Yonkers on the 17th day of April, 1943, as a protestant, filed a petition with the said Commission for a review, rehearing and reconsideration and reargument of said order and also that the order of the Interstate Commerce Commission be stayed to a later date; that the execution of the first order was extended by orders dated April 19th, 1943 (R. 109) and May 29th, 1943. On May 10th, 1943, the Interstate Commerce Commission made its order denying the petition for rehearing without allowing the protestants an opportunity to appear (R. 110). Subsequent orders suspending the abandonment of the line were made and finally a temporary stay was granted by a United States District Statutory Court, Southern District of New York, until Saturday, June 19th, 1943, at midnight.

This temporary stay was granted so that the appellants could apply to this court for a stay pending appeal as previously stated.

Instead of hearing the application for a temporary injunction the Statutory Court decided to hear the permanent injunction suit upon the merits.

After a trial the Statutory Court granted judgment to the defendants and dismissed the complaint on the merits. It is from this judgment that the appellants appeal.

The appellants instituted this suit and were listed as parties and appeared in all of the proceedings before the Interstate Commerce Commission. The Public Service Commission of New York State was also a party. It did not appeal.

The appellant, City of Yonkers, sues on behalf of itself and its inhabitants. It is their claim and it is a fact that they would be irreparably damaged by the abandonment of said line. The branch which the defendant, the New York Central Railroad Company, proposes to abandon is called Yonkers Branch Putnam Division, New York Central Railroad Company (R. 333). It is an electric railway (R. 182) and is commonly known and designated by the defendant railroad company as the "Yonkers Branch." Its northerly terminus is at Getty Square in the City of Yonkers, from whence it proceeds generally in a southerly direction through the City of Yonkers to the boundary line between the City of Yonkers and the City of New York, where it enters Van Cortlandt Park in the City of New York and continues generally in a southerly direction within the City of New York to the southerly terminus of said line of railway at Sedgwick Avenue, New York City. The distance between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is 7.8 miles (See Exhibit No. 1A, R. 343).

The distance of the part of the line to be abandoned is 3.1 miles (R. 180).

At a point on said electric railway, 3.1 miles from Getty Square in Yonkers, there is a junction, known as Van Cortlandt Park Junction, where the so-called Putnam Division of the defendant railroad company joins said electric railway, as shown by this map Exhibit 1A (R. 343). From that point southerly to the Sedgwick Avenue terminus the steam trains of the Putnam Division operate over the same tracks as the electric railway. Northerly from Van Cortlandt Park Junction, the Putnam Division proceeds in a northeasterly direction as far as Brewster, N. Y., while the so-called Yonkers Branch proceeds in a northwesterly direction to Getty Square, Yonkers.

The trains of the Putnam Division are operated by steam (not electricity), and the Putnam Division is not electrified. Therefore, the electric trains of defendant railroad company which operate over the electric railway in question are not and cannot be operated over the Putnam Division; such electric trains are operated only between Getty Square, Yonkers, and Sedgwick Avenue in New York City.

In connection with its application to the Interstate Commerce Commission, defendant railroad company stated:

"The line of railroad sought to be abandoned was constructed partly by Yonkers Rapid Transit Railway Company and The Yonkers Rapid Transit Railway Company and was completed by the New York and Northern Railway Company in 1888. The branch was built for the purpose of developing suburban business between the City of Yonkers and the City of New York" (R. 15 and 182):

The line was electrified in 1926, and, in the words of a witness for the railroad company, "it was expected that

a greater number of people having their business in New York City would reside in Yonkers and utilize the electric service to travel back and forth to business (R. 182).

The electric trains are comprised of two, three or four cars, including the hauling car which is not a locomotive but is an "MU" (multiple unit) car. In addition to supplying the means of locomotion for the train the MU car has provision for carrying passengers of its own—it is "somewhat in the nature of a trolley car." The structure of the line is such that locomotives cannot be used thereon, and the line carries no freight whatever. In the words of the railroad company's witness: "You have got a line that is built primarily for commuter passenger business." (R. 209)

The line carried over 600 passengers (each way) daily at the time application for certificate was made.

For fifty-five years the said railroad has performed the function for which it was constructed, namely, the development of suburban business between the City of Yonkers and the City of New York.

In the year 1890 the population of the City of Yonkers was 32,033. The present population of the City of Yonkers is 142,000.

The part of the railroad proposed to be abandoned within the confines of the City of Yonkers has four stations, namely, Caryl, Lowerre, Park Hill and Getty Square.

In the course of these fifty-five years prosperous suburban real estate developments have been built up around these stations. There is a very large development around said Caryl Station. In addition to purely suburban and residential properties, large apartment houses have been erected in that section as well as stores and other business buildings. The same may be said about the growth of the City of Yonkers around the Lowerre Station. This is

known as the Lowerre Section of the City of Yonkers and in this section are suburban homes, large apartment houses and many substantial business places, churches and schools. The next station is that known as Park Hill. The Park Hill Section on the easterly side of the railroad is purely residential and considered one of the most pretentious real estate developments in the City containing many substantial residences and is almost a community in itself, having its own social life centered around what is known as the Park Hill Country Club. The next station is Getty Square. This station is in the heart of the City of Yonkers and in Getty Square so-called are the largest and most pretentious buildings in the City. It contains all the main bank buildings and other business buildings. In recent years the Getty Square Station is contained in the First National Bank Building. This building also contains the main offices of the First National Bank. The upper floors are used for offices. It can be safely said that Getty Square is the hub and business center of the City of Yonkers. (R. 267 to 271)

This proposed abandonment would interrupt the orderly process of life of a large proportion of the people in these local communities mentioned for they have depended for many years in a large measure on the railway service furnished by the railroad which the defendant, New York Central Railroad Company, proposes to abandon. These local communities would not only lose this railroad service but in addition they would lose large sums in real estate values which would affect every property owner within the vicinity of this railroad proposed to be abandoned, and the resultant effect would be that the plaintiff, City of Yonkers, would also suffer great loss by reason of the diminution and loss of taxes. The testimony is that if this 3.1 miles part

of road is to be discontinued, it would cause a diminution in real property values of \$2,700,000 (R. 284) and that the population of the City of Yonkers affected would be 38,204. (R. 270 to 271)

The proposed report of Examiner Jordan (R. 31) at (R. 35) endeavors to show the annual loss of operating the branch would be \$56,941, based on the average revenues for 1940 and 1941, and concludes that this operating loss would impose an undue burden upon the carrier and upon interstate commerce. (R. 36 and 37)

Of course, this loss fails to take into consideration the tremendous increase in the net operating revenue of the company of the entire system in the last few years. (See Exhibit No. 4 to Return, R. 29.)

The main questions, and in all probability the main one, is, had the Interstate Commerce Commission the power to issue an order or certificate to abandon if the railway under consideration was a *street suburban or interurban electric railway* which was not operated as part or parts of a general steam railroad system of transportation.

The claim was asserted before the Interstate Commerce Commission before it finally acted in this matter that the Commission had no power to act because of these provisions contained in the Interstate Commerce Act (49 U. S. C. A., Section I, subdivisions 18 to 22). (See Exhibits K, L and M in our Bill of Complaint, R. 79, 89, 92, 99.)

In any event, it is elementary that jurisdiction can be raised at any time, if not waived.

It made no finding as to the status of this railroad.

It is our belief that under the statute and its rules the United States District Statutory Court should have made specific Findings in this case which it did not do, and par-

particularly it made no Finding as to the status of the railroad in question (R. 52 of F. R. C. P.).

We request the Court's indulgence and ask it to examine our statement as to jurisdiction, dated June 11th, 1943, which for the sake of brevity we will not print, and particularly paragraph 5, and the subdivisions thereof, and we also ask it to read our assignment of errors (R. 388, 389, 390 and 391), and particularly:

Specifications of Errors to be Urged.

We assert the Court below erred:

1. In failing to set aside and annul the order and certificate of the Interstate Commerce Commission dated March 20, 1943, as extended by orders made on April 19, 1943, and May 26, 1943 in Finance Docket #13194.

2. In failing to issue a permanent injunction setting aside, annulling and suspending said orders and certificate and enjoining and restraining the enforcement, execution and operation of said orders and certificate.

3. In failing to find that the so-called Yonkers branch, which the Interstate Commerce Commission authorized to be abandoned, is in fact and in law a suburban or interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation and that the Interstate Commerce Commission possesses no jurisdiction to entertain the application for or to act with respect to its abandonment.

4. In failing to find and decide that the Public Service Commission of the State of New York possesses exclusive jurisdiction with respect to the proposed discontinuance

of the four stations on said electric line in the City of Yonkers, New York, and with respect to the proposed abandonment of service over said electric line between Getty Square, Yonkers, and Sedgwick Avenue, New York City.

5. In failing to find and decide that the plaintiffs were denied a fair and adequate hearing by the Interstate Commerce Commission by reason of the denial of plaintiffs' applications for a further hearing or rehearing sought for the purpose of introducing evidence of materially changed conditions relating to facts found by the Commission as the basis for its determination and for the purpose of introducing newly discovered evidence which was not reasonably discoverable at the time of the original hearing before the Commission by the exercise of due diligence.

6. In failing to find and decide that the order of the Interstate Commerce Commission was wholly void and should be set aside because of the lack of basic or essential findings with respect to the jurisdictional question as to whether or not the line between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is a suburban or interurban electric railway not operated as a part or parts of the general steam railroad system of transportation.

7. In failing to find and decide that the findings made by the Interstate Commerce Commission were insufficient to sustain the conclusion that continued operation of the so-called Yonkers branch would constitute an undue burden upon interstate commerce and upon defendant, The New York Central Railroad Company.

8. In failing to find and decide that the action of the Interstate Commerce Commission in basing its determination upon findings which are unsupported by substantial evidence and in arriving at conclusions which are unsup-

ported by adequate findings was arbitrary and capricious, and in violation of the legal rights of plaintiffs, and is wholly null and void.

POINT I.

The Interstate Commerce Commission had no jurisdiction to issue its Certificate and Order of Abandonment.

The jurisdiction of the Interstate Commerce Commission with respect to abandonments is found in Section 1, subdivisions 18 and 22, of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, subds. 18, 22).

Subdivision 18 of Section 1 provides, in part, that:

“no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.”

This broad grant of authority is specifically limited by subdivision 22 of Section 1, which provides as follows:

Sec. 1, par: (22) *Construction; etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.”

The report of Division 4 (Complaint Ex. I) (R. 71) shows that the Interstate Commerce Commission made no findings whatever with respect to the question of whether this line is a "suburban, or interurban electric railway . . . not operated as a part or parts of a general steam railroad system of transportation," which is specifically excluded by statute from the jurisdiction of said Commission with respect to approval of its abandonment.

If the line in question is a "suburban or interurban railway" as defined in subdivision 22 of Section 1 of the Interstate Commerce Act, the Interstate Commerce Commission has no jurisdiction to authorize its abandonment. Therefore, the Certificate and Orders of the Commission are null and void.

No findings were made by the Commission itself as to whether or not this line, as previously pointed out, between Getty Square, Yonkers, and Sedgwick Avenue, New York City, is a suburban or interurban electric railway and no finding was made as to whether or not the line is "operated as a part or parts of a general steam railroad system of transportation," nor did the court below make any such finding.

In the entire record there is not one solid finding of fact stating just what type of railway this is.

In the cases in this Court we have read on this question, in relation to subdivision 22 of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, Subd. 22) there has always been a finding by the Interstate Commerce Commission as to whether or not the railway in question came within or without the statute.

As was said in *Florida v. United States*, 282 U. S. 194 at page 215:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination * * * but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

If there has been no such finding here how can the court pass upon a nonexistent finding?

The Commission before it proceeded should have first considered whether it had jurisdiction or not.

United States v. Baltimore & Ohio R. Co., 293 U. S. 454.

Apart from that contention, we submit it is clear from the record made before the Interstate Commerce Commission that if it had found it had jurisdiction such a finding would have been wholly without substantial evidence to support it; and that, upon the undisputed facts as disclosed by such record, the line in question falls within the exception to the jurisdiction of the Commission as contained in subdivision 22 of Section 1 of the Interstate Commerce Act.

In a case involving the question of whether an abandonment authorized by the Interstate Commerce Commission constituted a "spur" within the meaning of the very statutory provision involved in this case, the Supreme Court said:

"Whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision

of a court—not to the final determination of either the federal or a State commission.” (United States v. Idaho, 298 U. S. 105, 109).

In *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission* (286 U. S. 299) the Court described a “suburban or interurban electric railway” in terms which are peculiarly significant and applicable to the facts of this case, as follows:

“No difficulty is encountered in defining a street or a suburban electric railway. These are *essentially local*, are *fundamentally passenger carriers*, are to an *inconsiderable extent engaged in interstate carriage*, and *transact freight business only incidentally and in a small volume*. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distant communities, and that in addition so-called interurban lines were constructed from time to time, to serve the convenience of two or more cities. *But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars.* Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads.”

In the present case, it will be noted that *no freight whatever* is carried by the line in question. It is solely a passenger line—“* * * You have got a line that’s not built for freight. You have got a line that is built primarily for commuter passenger business” (R. 209). There is no evidence in the record made before the Commission that it is engaged to *any extent whatever in interstate commerce*. It is “essentially local” and carries passengers between the

four stations in the City of Yonkers, to stations in the City of New York. It is operated by "single or series of self-propelled cars"—The "MU" car, and the undisputed evidence shows that ordinary locomotives cannot be operated over the line—"As I say, these bridges are too light for a locomotive" (R. 208).

The fact that the line was not originally constructed as an "electric railway," is, we submit, immaterial. So far as "abandonment" is concerned, the statute relates to *presently existing* "suburban or interurban railways" and there is nothing in the statute or in the decisions thereunder which purports to limit its application to railways which were originally constructed as electric railways. It might be urged that the line proposed to be abandoned is not individually owned and is the property of the New York Central Railroad Company. The cases seem to hold that the question of a single ownership is not controlling in interpreting the statutes involved herein.

In the development of transportation, steam railways, of course, preceded electric railways. When subdivision 22 was first enacted in 1920 (Transportation Act of 1920, c. 91, Sec. 402, 41 Stat. 478) there were undoubtedly in existence electric railways of the described class which were originally operated by steam and had later been converted to electricity when that source of motive power was introduced. Certainly no one would contend that such electric railways were not within the purview of subdivision 22 at the time of its enactment in 1920. Nor can it be said that subdivision 22 applies only to electric railways which were in existence at the time of its enactment. Such a construction would exclude electric railways thereafter constructed, contrary to the manifest intention of Congress to exclude from the jurisdiction of the Commission *all* electric railways within the described class. When the line in question was

electrified in 1926 the effect thereof, so far as the statutory provision is concerned, was exactly the same as though an entirely new line was constructed. Thereafter the line *constituted* a "suburban or interurban electric railway" and the provision in question became applicable thereto.

But one further question remains—is the line "*operated*" as a *part or parts* of a general steam railroad *system of transportation*? We submit that this phrase relates to the situation where the "suburban or interurban electric railway" is an integral link in a steam railroad "system," the construction or abandonment of which would constitute an "extension" of such "steam railroad system of transportation" or an "abandonment" *pro tanto* of such "steam railroad system of transportation."

The so-called "Hudson Division" of the defendant railroad company affords an example. That division is a part of the line of the railroad between New York and Chicago. It is electrified from New York to Harmon, and passes through the City of Yonkers. An abandonment of the portion of that line between New York City and Yonkers would constitute an abandonment of a "portion of a line of railroad" within the meaning of subdivision 18 of Section 1 of the Interstate Commerce Act and although such portion is an "electric railway" running between the City of Yonkers and the City of New York and is, therefore, "interurban," it is also obviously "*operated as a part or parts of a general steam railroad system of transportation*" and, therefore, is not within the exception provided for in subdivision 22.

The so-called "Yonkers branch," on the other hand, is not "*operated as a part*" of defendant railroad company's Putnam Division or of any "general steam railroad system of transportation," albeit the Yonkers Branch and the Putnam Division trains pass over the same trackage as

far as Van Cortlandt Park junction. The trains of the "Yonkers branch" *cannot* pass over the Putnam Division to Brewster, because that line is not electrified beyond Van Cortlandt Park Junction; the Yonkers branch trains proceed *only* to Getty Square, Yonkers. Conversely the trains of the Putnam Division, which are drawn by steam locomotives, *cannot* proceed over the Yonkers branch to Getty Square, because the bridges on the electric line will not carry the locomotives.

The electric railway in question is not in any real sense operated as a "part" of the Putnam Division. It is a "commuters line" admittedly designed for the specific purpose of carrying commuters between their homes in Yonkers and their places of business in New York City. If the line were abandoned the Putnam Division would continue to operate as it has in the past, and the abandonment would not interfere in the slightest degree with such operation. On the other hand, service on the Putnam Division—the "general steam railroad system of transportation"—could be discontinued, and the "Yonkers branch," from Sedgwick Avenue, New York, to Getty Square, Yonkers, being electrified, could continue in operation. The two lines are wholly independent except for the fact that for a distance of approximately 4.7 miles they use the same track. That fact, we submit, is wholly immaterial; the situation, for the purposes of the statutory provision involved, is exactly the same as though a separate line of track, paralleling the existing track, were installed to carry the electric railway trains.

In the case at bar, as we have already pointed out, there is no finding whatever as to the status of that part of the Railroad to be abandoned.

As Mr. Justice Roberts said in the *Chicago, North Shore & Milwaukee Railroad Company* case, 288 U. S., at page 11:

"As indicated in the Piedmont & N. R. Co. case, *supra*, the phrase 'interurban electric railway' may not in all circumstances be susceptible of exact definition. The Commission has realized the difficulty."

Mr. Justice Roberts then goes on to cite examples as to the uncertainty of the Interstate Commerce Commission in this respect.

We believe, in the first place, that the Interstate Commerce Commission had no jurisdiction over the line proposed to be abandoned. In the second place, that if it had it should have made a proper finding of fact that it had jurisdiction, so that the question of its jurisdiction could be properly raised. In the third place, we believe that the United States District Statutory Court erred in assuming that the Interstate Commerce Commission had jurisdiction in this case.

POINT II.

The operating loss sustained is not an undue burden upon the New York Central Railroad Company and Interstate Commerce.

In the proposed report of Examiner Jordan of the Interstate Commerce Commission (R. 34 at page 35) he estimated that the operating loss would be \$56,941 for the years 1940 and 1941.

The Interstate Commerce Commission, Division No. 4 (R. 76) referred to this operating loss of \$56,941 for the years 1940 and 1941.

As we said in our petition to the Interstate Commerce Commission (Ex. K, R. 79) for a re-hearing:

"1. *That the continuation of said part of line will not be an undue burden on interstate commerce.*

That the proposed report of Lucian Jordan, Examiner for the Commission, which was confirmed by the Commission in its order dated March 20th, 1943, contains this proposed finding on Sheet 5 of said report, lines 53-55, inclusive:

(fol. 86) 'Continued operation would impose an undue and unnecessary burden upon the applicant and upon *interstate commerce*'. (Italics ours.)

That the applicant in its Return to Questionnaire dated August 19th, 1942 included therein Exhibits designated in said Return to Questionnaire as Exhibits 3 and 4. That said Exhibit No. 3 shows a condensed general balance sheet of the New York Central Railroad Company as of May 31st, 1942. That said Exhibit No. 4 shows the condensed income account of the New York Central Railroad Company for the years 1937-1941 and for five months ended May 31st, 1942 (R. 29).

That according to this said Exhibit No. 4, the only year the applicant had a deficit was in the year 1938. That according to this exhibit, for the first five months in the year 1942 up to May 31st of that year, the net income was \$11,351,125. That the said exhibit does not contain the full income account for the year 1942. That, therefore, it necessarily follows that it does not give a complete financial picture of the applicant's finances or operating income for the year 1942.

That since the hearing held in this proceeding on November 12th, 1942, a proceeding was instituted before the Interstate Commerce Commission, entitled 'Ex Parte No. 148 Increased Railway Rates, Fares and Charges, 1942'.

That at hearings held in that case there were introduced in evidence Exhibits submitted on behalf of the Public Service Commission of the State of New York

known as Exhibits Nos. A-33 and A-34. That these Exhibits show the complete financial picture of the financial operations of the New York Central Railroad Company for the years 1941 and 1942.

That at page 5, table 11 of Exhibit A-33 there is set forth the net railway operating income after Federal and Canadian Income Taxes for the year 1941. That this amounts to the sum of \$61,883,963. It excludes the sum of \$4,464,303 for depreciation on B. & A. property applicable to a period prior to 1941. That Table 201 of Exhibit A-34 shows that in the year 1942 the net railway operating income of the company, after expenses and Federal Income Taxes amounted to \$90,399,495.

(fol. 87) That those same exhibits (A-33, page 8, Table 14, and A-34, Table 203) show the annual rate of return earned by the New York Central Railroad Company on the book value of its property for the year 1942 after payment of all expenses and Federal and Canadian Income Taxes was 5.06% as compared with a return on the same basis for the year 1941 of only 3.46%.

That the report in the instant proceeding accompanying the certificate or order dated March 20th, 1943, shows, according to said report, that the estimated annual loss in operating part of said line which was sought to be abandoned was the sum of \$56,941 based upon the average revenues of said line for the years 1940 and 1941.

That if this loss had been saved because of the fact that the Company was paying Federal and Canadian Income Taxes, the actual saving would have been \$22,775 less, or a net loss to the Company of \$34,165.00. Such a saving would have improved the rate of return earned by the Company of only 19/10000 of 1% (.00191148%). It is apparent that such an insignificant loss could not reasonably constitute a burden upon interstate commerce. That if the proposed reduction in assessments is made as outlined

below of \$224,000 amounting to a tax saving of \$8,772.76, the net loss would be correspondingly less.

That if the City of Yonkers, the protestants herein, were allowed to introduce the same figures included in said Exhibits Nos. A-33 and A-34 in Ex Parte No. 148 Increased Railway Rates, Fares and Charges, 1942, in this proceeding at a rehearing of this case, it would show the true financial picture of the applicant and that its financial condition was getting better year by year, and that in the light of its increased earnings it could not correctly maintain that the loss which it allocates to the operation of that part of the line which it seeks to abandon would interfere in the slightest with interstate commerce, and that there is no overriding interest of interstate commerce to call for Federal interference directing abandonment.

That as we said above, the hearing in this proceeding was (fol. 88) held on November 12th, 1942. That these exhibits known as Nos. A-33 and A-34 were not prepared until February, 1943 so that they were not available at the hearing on this application which was held in the City of Yonkers, New York on November 12th, 1942 and, therefore, could not be introduced in evidence". (R. 81 to 83). (See affidavit of McGregor, R. 89 to 92).

POINT III.

There is no overriding interest of Interstate Commerce to call for Federal interference directing abandonment.

As we have shown above, there is no overriding interest of Interstate Commerce involved here.

The proposed abandonment of this line means a curtailment of local service and the discontinuance of four of its stations in the City of Yonkers, namely, Caryl, Lowerre,

Park Hill and Gétty Square. If there is no overriding interest of interstate commerce, the power to regulate purely local service and discontinue stations is within the State (See Section 54 of the Railroad Law of the State of New York, as amended. Chapter 49 of the New York Consolidated Laws).

This Court has been diligent in preserving the powers of the States.

As said in the case of *Palmer v. Massachusetts*, 308 U. S., 79-96, in an opinion written by Mr. Justice Frankfurter, pages 83, 84 and 85:

"Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative

policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 US 352, 57 L ed 1511, 33 S Ct 729, 48 LRA (NS) 1151, Ann Cas 1916A 18; cf. *Kelly v. Washington*, 302 US 1, 82 L ed 3, 58 S Ct 87.

The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states. Even when the Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado v. United States*, 271 US 153, 70 L ed 878, 46 S Ct 452, this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuances. *Re Kansas City S. R. Co.* 94 Inters Com Rep 691; see *Re Morris & E. R. Co.* 175 Inters Com Rep 49."

POINT IV.

The proposed abandonment of the railroad in question would cause great hardship and irreparable damage to the City of Yonkers and its inhabitants.

The proposed report of Examiner Jordan tends to show the manner in which the City of Yonkers and its inhabitants would be affected by this proposed abandonment. We quote from his report (R. 31 at 34 and 35):

"The Deputy Tax Commissioner of Yonkers expressed the view that the area tributary to the

branch is somewhat more extensive than that assigned by the applicant, and that the population thereof was 38,204 in 1940. The assessed value of the land and improvements of the area is \$27,901,250. A real estate broker of Yonkers testified that in his opinion that valuation would be decreased approximately 10-percent if the line is abandoned".

This would mean a loss in valuation, according to our real estate expert of \$2,790,125.

In addition to this loss of real estate value, this curtailment of service at this time would mean great inconvenience to the travelling public. This Court can take almost judicial notice of the over-crowding of all means of transportation, railroad trains, street cars and busses. The affidavit of the War Transportation Administrator of the City of Yonkers illustrates this point. (R. 371, 372)

The record without further comments proves the damage and hardship this abandonment would cause the Appellant City and its inhabitants.

POINT V.

The judgment of the court below should be reversed, and the permanent injunction prayed for granted.

Respectfully submitted,

PAUL L. BLEAKLEY,

JOHN J. BRODERICK,

Counsel for Appellant, City of Yonkers.

FILE COPY

No. 109

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President of Committee of Yonkers Commuters, etc.,

Appellants,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY.

BRIEF OF APPELLANT, JOHN W. TOOLEY, JR.

HORACE M. GRAY,
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42 Broadway,
New York City, N. Y.

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY.

BRIEF OF APPELLANT, JOHN W. TOOLEY, JR.

STATEMENT.

This is an appeal from a final judgment of a Statutory Court sitting pursuant to §§ 41 (28), 43-47, Title 28, U. S. Code, in the Southern District of New York, which denied injunctive relief and dismissed the complaint in the within action brought to vacate, enjoin and set aside a certificate and order issued by the Interstate Commerce Commission (hereinafter referred to as the Commission) purporting to authorize The New York Central Railroad Company to abandon that part of an intrastate, inter-urban, electric passenger railway extending a distance of approximately 3.1 miles between Van Cortlandt Park Junction, New York City, N. Y., and Getty Square, Yonkers, N. Y.

OPINION BELOW.

The opinion below is printed at pages 381-385 of the Record. The Judgment is found at page 385. No Finding of Facts under Rule 52, F. R. C. P. was filed.

JURISDICTION.

The judgment of the Statutory Court was entered on June 10, 1943 (R. 385). A motion made on behalf of the United States of America to affirm the judgment below was denied by this Court on June 21, 1943 (R. 400). The jurisdiction of this Court is invoked under §§ 47 and 47a of Title 28, U. S. Code.

QUESTIONS PRESENTED.

1. Recognition of the reserved powers of the State of New York.

2. The Commission illegally usurped the exclusive jurisdiction of the Public Service Commission of the State of New York over the subject matter.

3. The due process of law guaranteed to the appellants by the Fifth Amendment to the Constitution has been violated because:

(a) The Commission is without jurisdiction to make the order questioned.

(b) Even if the Commission had jurisdiction of the subject matter:

(1) It sought and accepted evidence *ex parte* without the knowledge or consent of the appellants and in violation of one of its own rules of procedure (Rule 22).

(2) The denial by the Commission of the appellants' applications to present further newly discovered evidence as to present and

future convenience and necessity and as to probable substantial reduction in, or elimination of alleged operating loss and the affirmation thereof by the lower Court was arbitrary, capricious and unjust.

(3) The determinations by the Commission and by the lower Court are not supported by the appropriate findings of fact required by law.

PROCEEDINGS IN THE LOWER COURTS.

This appellant filed exceptions to the Examiner's Proposed Report (R. 44-57) and moved for further hearing, reconsideration and vacation of the order of March 20, 1943, and for leave to adduce material, newly discovered evidence (R. 92-98); and participated as a party in all proceedings described at pages 3-5 of the brief filed herein by the appellant, City of Yonkers, repetition of which seems unnecessary.

FACTS.

The facts material to the consideration of the questions of law raised in this brief are:

The respondent, The New York Central Railroad Company, hereinafter referred to as the New York Central, operates an electric, inter-urban passenger railway between Getty Square, Yonkers and Sedgwick Avenue, New York City, a distance of about 7.8 miles, called the Yonkers Branch (R. 17, 332).

At Van Cortlandt Park, on the line, 3.1 miles below Getty Square, the steam Putnam Division of the New York Central switches into the electric line (R. 19, 182, 348A) and the trains of the Putnam Division also use the electric tracks between the Junction and Sedgwick Avenue.

The New York Central applied to the Commission for leave to abandon only the 3.1 mile section of the Yonkers Branch between the junction at Van Cortlandt Park and Getty Square (R. 15). Such abandonment would result in the discontinuance of all electric service between Getty Square, Yonkers, and all way stations on the electric line south to Sedgwick Avenue.

The Yonkers Branch carried no freight, mail, express nor milk (R. 19-20). Its bridges are too light to support steam locomotives (R. 208). Its business was wholly intrastate, inter-urban passenger traffic, principally commuting. Passengers bound for the Grand Central Station in New York City could transfer to the electrified Hudson Division of the New York Central at University Heights and at Highbridge (R. 188) where the tracks of the two lines were parallel. Also, until June, 1940, passengers had transferred at the Sedgwick Avenue terminus directly to the Ninth Avenue El line and until December, 1938, to the Sixth Avenue El and these express railways carried them to downtown New York City (R. 194).

When the two elevated railways were discontinued a shuttle service was preserved (R. 194) at Sedgwick Avenue over the elevated tracks to permit passengers to transfer to the Independent Subway at 155th Street on the west side of the Harlem River and to the Interborough Subway, Lexington Avenue Line, at 167th Street. This service, however, was slow and inconvenient.

Immediately before the Sixth and Ninth Avenue elevated services were discontinued, the New York Central ran 43 trains daily and 5 on Sundays on the Yonkers Branch to and from Sedgwick Avenue (R. 17) and while the El lines acted as feeders the Branch apparently operated at a profit.

After the filing of the Proposed Report of the Examiner the Committee of Yonkers Commuters learned (R. 359-60) that the City of New York had included in its schedule of post-war projects the extension of the West Side Subway from 145th Street and Lenox Avenue to 155th Street where it would join the tracks of the shuttle train which had been kept in operation for this very purpose, and run through the station at Sedgwick Avenue to connect with the Lexington Avenue Subway at 162nd Street. This extension when made would restore quick connections between the Sedgwick Avenue terminus of the Yonkers Branch and downtown New York via the New York City Rapid Transit system and would re-establish the traffic which had formerly been carried by the Sixth and Ninth Avenue elevated lines as feeders to the Yonkers Branch at Sedgwick Avenue. This appellant, accordingly, asked leave to introduce this new evidence (R. 93, 94, 98) but his application was denied (R. 110).

Further facts are detailed by the appellant, City of Yonkers, at pages 5-9 of its brief herein and are thought to require no repetition.

SPECIFICATION OF ERRORS TO BE URGED.

This appellant urges all the errors assigned (R. 389-91).

ARGUMENT.

POINT I.

THE COMMISSION IS WITHOUT JURISDICTION OF THE SUBJECT MATTER OF ITS ABANDONMENT CERTIFICATE AND ORDER OF MARCH 20, 1943. HEREIN BECAUSE THE YONKERS BRANCH IS AN INTER-URBAN ELECTRIC RAILWAY WHICH, UPON THE RECORD, IS NOT OPERATED AS A PART OR PARTS OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION.

The Commission asserts jurisdiction of this proposed abandonment under the provisions of § 1 (18)

of the Interstate Commerce Act (49 U. S. C., § 1 [18]) which provides:

“ * * * No carrier by railroad *subject to this chapter* shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or *future public convenience and necessity* permit of such abandonment.” (Italics supplied.)

But the Yonkers Branch is not “subject to this chapter” because roads of its type are expressly excluded from the jurisdiction of the Commission by § 1(22) of the same Act which provides:

“The authority of the Commission * * * shall not extend to the * * * abandonment * * * of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.”

There is no dispute that the Branch is an interurban, electric line that is exclusively a passenger carrier and that it makes no interchange of standard freight equipment of any character.

Neither the Commission nor the lower Court has made any finding of facts defining the Yonkers Branch as a part “of a steam railroad system of transportation.” Besides, there is no evidence in the Record that would support such a finding or which would take the Branch out of the category described by this Court in *U. S. v. Chicago, N. S. & M. R. R. Co.*, 288 U. S. 1; and in *Piedmont & Northern R. Co. v. I. C. C.*, 286 U. S., 299, 307.

The defect goes to the jurisdiction of the Commission and is fatal to the validity of the order and certificate under attack.

This Court is in no position to pass upon the jurisdictional question here involved without a detailed scrutiny of the evidence as though a court of first instance.

And this situation exists in spite of the strong condemnation of such practices of the Commission by this Court in *Beaumont, S. L. & W. Ry. Co. v. U. S.*, 282 U. S. 74, at page 86.

Again, as this Court said in *Florida v. U. S.*, 282 U. S. 194, at page 208:

"Such a conclusion would not only require evidence to support it but findings of appropriate definiteness to express it."

There is no presumption of law that the Commission has jurisdiction of the abandonment of a line that is an inter-urban electric railway.

Jurisdiction of the Commission is a mixed question of fact and law (*U. S. v. Idaho*, 298 U. S. 105, 109). There is no support in this record for the legal conclusion that the Commission has jurisdiction of this Branch.

Since it has not been shown to have jurisdiction of the subject matter, its order and certificate violate the due process clause of the Fifth Amendment to the Constitution.

POINT II.

THE COMMISSION IS WITHOUT JURISDICTION OF THE SUBJECT MATTER BECAUSE THE YONKERS BRANCH LIES WHOLLY WITHIN THE BOUNDARIES OF THE STATE OF NEW YORK AND THE RECORD CONTAINS NO FINDINGS OF FACT NOR EVIDENCE SUFFICIENT IN LAW TO ESTABLISH JURISDICTION THEREOF IN THE COMMISSION.

The Commission is also faced with a still more difficult obstacle to the validity of its order and certificate.

The Commission derives whatever power it has fundamentally from the Commerce Clause in § 8 of Article I of the Federal Constitution, viz:

“The Congress shall have Power to * * * regulate Commerce with foreign Nations, and *among* the several States * * *” (Italics supplied.)

This delegation of authority is limited by the Tenth Amendment to the Constitution, viz:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

It is an undisputed fact that the Yonkers Branch lies wholly within the State of New York. There is no evidence and no finding in this Record that it is engaged in interstate commerce in the slightest degree.

Hence, from the physical standpoint, the Commission has no jurisdiction over the abandonment of the Branch. That jurisdiction lies solely within the power of the State regulatory body.

The jurisdiction asserted by the Commission is a derived jurisdiction based upon the ruling of this Court in *Colorado v. U. S.*, 271 U. S. 153.

The *Colorado* case can jibe with the Constitution only upon the theory that Congress—and, derivatively, the Commission—may interfere with local intrastate transportation matters when it clearly appears *as a matter of law* that the continued operation of the intrastate railway would impose an *undue burden* upon interstate commerce.

Such *undue* burden should actually, and as a legal conclusion, operate to cripple the applicant's main line, or affect its utility or service as an artery of interstate

and foreign commerce, or operate as an obstruction to interstate commerce. On this feature there is evidence only that on the basis of 1940 and 1941 results the Branch would show an alleged operating deficit of some \$56,000 (R. 35) and that the net earnings of the New York Central system have been consistently increasing by leaps and bounds ever since 1938 (R. 29). No application to abandon this Branch was made in 1938 when the system was operating at a net loss.

Unless the doctrine of the *Colorado* case is applied with the rigidity of a statute, the door would be opened to the Commission to invade and usurp the sovereign powers of the State as a matter of *discretion* and not as a matter of law.

As already shown, the question of jurisdiction of the Commission is a mixed question of law and fact. And a conclusion of ~~law~~ is impossible without a prior finding of facts as a basis for it.

In the case at bar, the Commission made no finding of facts that can support a *legal conclusion* that "its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty" (*Colorado v. U. S.*, *supra*, pp. 162-3).

The New York Central itself did not claim in its application that its alleged operating loss constitutes an *undue burden* on interstate commerce (R. 25).

Anything less than a clear conclusion of law based upon an adequate finding of facts would impose the discretion of the Commission upon the State of New York in its domestic affairs—a result abhorrent to every principle of Constitutional law and derogatory to every sovereign power of the State of New York.

That is just what has happened in this case.

Due process of law has been denied these appellants through the infringement of their rights by an

order of a governmental body that is without jurisdiction to affect them and the denial of relief by the lower Court.

POINT III.

WHERE CONFLICT OF JURISDICTION EXISTS BETWEEN THE COMMISSION AND A STATE REGULATORY BODY, ALL DOUBTS MUST BE RESOLVED IN FAVOR OF THE EXCLUSIVE JURISDICTION OF THE STATE REGULATORY BODY.

The abandonment of the Yonkers Branch presents a matter of purely local concern affecting domestic transportation problems which, according to every rule of logic, should be resolved by the State regulatory body.

Obviously, the State regulatory body is infinitely better qualified to deal with local conditions than a nationwide Commission.

If, perchance, either party feels aggrieved by the action of the State regulatory body, he may have recourse to the Courts of the State and this Court may review by *certiorari* if so disposed.

No convincing reason is apparent why such purely local controversies should be foisted upon the Federal Courts to clog their dockets and find their way into this Court through statutory right of appeal by reason of efforts of the Commission to expand its jurisdiction beyond the plain language and reasonable intent of the statute from which it derives its powers.

From the very earliest times, this Court has been extremely chary of permitting any invasion of the reserved powers of the States by expansive, subordinate agencies of Congress.

If the bald conclusion of "undue burden" need alone be invoked as an *open sesame* to unlimited interference in the domestic affairs of the states, it would be too much to expect that there would be any voluntary restriction of so broad a field for expanding endeavor.

But when "undue burden" is held down to a strict legal conclusion—especially where conflicting state rights are involved—which must be clearly and strongly supported by findings of facts which, in turn, must be buttressed by competent evidence in the record, then abounding bureaucracy will be held in check and the requirements of due process of law will be accorded the protection and respect that the Constitution demands.

A recent expression of the salutary policy of this Court appears in *Palmer v. Massachusetts*, 308 U. S. 79, at pages 84-5:

"Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress.

"The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the state. Even when the Transportation Act of 1920, 49 U. S. C. A. § 1(18-20), gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado v. U. S.*, 271 U. S. 153, * * * this was not deemed to confer upon the Commission jurisdiction over curtailment of service and *partial discontinuances*." (Italics supplied.)

In the case of *Florida v. U. S.*, 282 U. S. 194, this Court said at pages 211-12:

"The propriety of the exercise of the authority must be tested by its relation to the purpose of the grant and with suitable regard to

the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the *justification* of the exercise of the federal power *must clearly appear*. *Illinois C. R. Co. v. State Public Utilities Commission*, 245 U. S. 498." (Italics supplied.)

This is not a case where a Federal act purports to override a state law because of repugnance or conflict in a field where Congress has been granted the power to legislate, but rather an actual invasion of a reserved field of State authority by a subordinate agency of Congress without even an alleged factual foundation found by it to support a legal right to do so.

A clear limitation of jurisdiction is provided by the Transportation Act under which the Commission functions (49 U. S. C. § 1[1] and [2]) in the language:

"(1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers
* * * from one State * * * to any
other State * * *

(2) The provisions of this chapter * * *
shall not apply—

(a) To the transportation of passengers
* * * wholly within one State * * *

Again, this Court said in *Sinnot v. Davenport*, 22 How. 227, which involved an application of the navigation laws, at page 243:

"We agree, that in the application of this principle of supremacy of an Act of Congress in a case where the State law is but the exercise of a reserved power, *the repugnance or conflict* should be *direct and positive*, so that the two

acts *could not* be reconciled or consistently stand together; and also, that the Act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question." (Italics supplied.)

The appellants, therefore, have been denied due process of law through the illegal intrusion of a body foreign to the State which undertakes to permit the abandonment of this wholly intrastate electric passenger railway.

POINT IV.

THE APPELLANTS ARE ENTITLED TO A FULL AND FAIR HEARING ACCORDING TO THE LAW OF THE LAND UPON AN APPLICATION FOR ABANDONMENT UNDER 49 U. S. C. §1(18-21), BUT THE REQUIREMENTS OF DUE PROCESS OF LAW HAVE BEEN DENIED TO THEM HEREIN THROUGH THE ARBITRARY AND CAPRICIOUS ACTION OF THE COMMISSION AND BY THE LOWER COURT.

First, the appellants have been denied due process of law because of two occurrences set forth in the Record.

During the argument before the Statutory Court this amazing statement was made by the attorney for the Commission (R. 151):

"Under our cooperative plan with the War Department and the War Production Board, we notify them of applications for permission to abandon as these are filed and advise them of the status thereof. The War Department in each case *notifies us* whether it considers the line involved of military value. The War Production Board *forwards to us as information* notices of the requisition of lines of railroads and *materials which it considers* suitable for salvage purposes. In other words, lately and during the war there has been quite a spurt in abandonment cases *owing to the desperate need* of the War Department not only for scrap metal but also for relaying rails." (Italics supplied.)

Again, while the appellants' motions for re-argument and for the admission of newly discovered evidence were pending before the Commission, the following letter was written by Mr. Robert Moses, Park Commissioner, City of New York, to the Secretary of the Commission, seeking to influence its decision on the pending motions (R. 379-80):

The City of New York,
 Department of Parks
 Arsenal
 64th Street and Fifth Avenue
 Central Park
 New York City

April 30, 1943.

Hon. W. P. Bartel,
 Secretary,
 Interstate Commerce Commission,
 Washington, D. C.

Dear Sir:

At the request of the Mayor of the City of New York, I am writing to state the City's position in respect to the petition for re-hearing of the application of The New York Central Railroad Company, Finance Docket 13914, for authority to abandon its Yonkers Branch, which is located partly within the City of New York.

It is our opinion that the abandonment should be authorized in view of the losses entailed in operation, the existence of other adequate means of transportation, and the benefit to the City Park System which would result from the removal of the line through Van Cortlandt Park.

The suggestion in the petition for re-hearing that the City of New York will reduce the taxes on the right-of-way through Van Cortlandt Park by \$10,000.00 deserves no consideration whatever. It must have been made in total

disregard of the fact that New York City collects less than \$11,000.00 taxes on this property. It is obvious that talk of such reduction is idle and irresponsible, and is made solely for the purpose of prolonging the proceeding. The City has no reason for perpetuating a line through one of its important parts by reducing the taxes on that line. The taxes now paid do not compensate the City for the inconvenience caused to its citizens by the maintenance of the line through Van Cortlandt Park.

In respect to a possible Broadway subway extension, no assurance can be given that it will ever be carried out. Certainly it is not reasonable to force the New York Central Railroad to continue a non-profitable operation for many years in order to provide a connection to a non-existent and highly dubious future subway extension. I therefore request on behalf of the City that the petition for re-hearing be denied.

Very truly yours,

ROBERT MOSES, Park Commissioner,
Member of the City Planning Commission.

This letter was filed and accepted by the Commission in violation of Rule 22 of its own General Rules of Practice (adopted July 31, 1942, and effective September 15, 1942, see Rule VI(b), Fed. Code Ann., Vol. 10A, p. 762) which provides:

... * * * every pleading, document, or paper must, when filed, or tendered to the Commission for filing, include a certificate showing simultaneous service thereof upon all parties to the proceeding."

Entirely aside from the questionable ethics of this furtive and apparently successful maneuver, the appellants were denied all opportunity to cross-examine the persons so communicating with the Commission, to

record objections to the character, materiality and competency of such evidence and to meet it with other evidence.

This Court needs no authorities to assist it in its treatment of so outrageous a violation of the most fundamental principles of due process and fair dealing.

Mr. Moses' assertions were directly contradicted by the letter from the Board of Transportation of the City of New York (R. 373—Item 2; R. 373, Paragraphs 1 and 2).

This issue of subway rapid transit extension to Sedgwick Avenue went to the question of *future* convenience and necessity as well as to the prospects of profitable operation and the appellants' motion for a rehearing should have been granted.

The appellant also sought a rehearing to show

(a) That Yonkers City Taxes on the right of way would be substantially reduced with consequent saving to the carrier;

(b) That in the exercise of good faith the carrier could reduce its taxes paid the City of New York on the right of way through Van Cortlandt Park by several thousand dollars.

All the proffers of new evidence went directly to the reduction of the alleged operating deficit of about \$56,000.

Refusal of the Commission to admit further evidence on this critical subject was clearly arbitrary, capricious and unjust and a violation of the appellant's right to due process.

The lower Court ruled (R. 384) on the authority of *Woodruff v. U. S.*, 40 F. Supp. 949, that the appellants were not entitled to a re-hearing on the ground

that they were not entitled to any hearing in the first place before the Commission.

That ruling is in direct conflict with the decisions of this Court (*Shields v. Utah, Idaho Cent. R. Co.*, 305 U. S. 177, 182; *U. S. v. Illinois Central R. Co.*, 291 U. S. 457, 460-1); with the Fifth Amendment to the Constitution, and with § 1(19) of the Interstate Commerce Act (49 U. S. S. § 1[19]).

CONCLUSION.

The judgment of the lower Court should be reversed and the order of the Interstate Commerce Commission dated March 20, 1943, should be vacated, annulled and set aside.

Respectfully submitted,

HORACE M. GRAY,
Attorney for Appellant, Tooley.

**In the District Court of the United States
for the Southern District of New York**

Civil No. 21-271

**PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK, ET AL., PLAINTIFFS-APPELLANTS**

v.

**UNITED STATES OF AMERICA, ET AL., DEFENDANTS-
APPELLEES**

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted district court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The decree, together with written opinion, was entered on June 10, 1943. An appeal was allowed on June 11, and the appellees were served with the appeal papers on June 15. On June 17 appellants presented before Mr. Justice Jackson their petition for a stay pending appeal. Appellees appeared in opposition.

Mr. Justice Jackson stated that he would not grant the stay at this time, but that appellees might file a motion to affirm directly with this Court at once, in order that the full Court might pass upon the Court's jurisdiction and the consequent need for a stay at this Term.

The order of the Commission, Division 4, dated March 20, 1943, granted appellee New York Central Railroad a certificate of public convenience and necessity, under Section 1 (18)-(22) of the Interstate Commerce Act (49 U. S. C. sec. 1 (18)-(22)), to abandon its so-called Yonkers branch.¹ A petition for rehearing was denied by the entire Commission on May 10, 1943. The order was attacked in the District Court by the New York Public Service Commission, the City of Yonkers, New York, and a committee of Yonkers commuters. Only the latter two have so far appealed from the decree below.

The pertinent facts, as they appear from the decision of the Commission and that of the District Court, are as follows: The Yonkers branch is an electrified, exclusively passenger line owned and operated directly by the New York Central Railroad. It extends for a distance of 3.1 miles from Getty Square in Yonkers, New York, to a

¹ This order will now become effective on June 19, 1943, but the New York Central Railroad agreed before Mr. Justice Jackson to continue operations through June 1943 without a stay, in order that the Court might pass upon the case at this Term.

junction with the Putnam Division of the New York Central at Van Cortlandt Park Junction. Service is rendered over the line by two- to four-car trains which run from Getty Square to the connection with the Putnam Division at Van Cortlandt Park Junction, thence down that division through station stops known as University Heights and High Bridge, to the terminus of the Putnam Division at Sedgwick Avenue. The total length of these operations is 7.8 miles. The Commission's order will permit the abandonment of these through operations for the 7.8-mile distance and actual physical abandonment of the line for the 3.1-mile distance to Van Cortlandt Park Junction.

The New York Central has two other lines passing through Yonkers and into New York City, which parallel the Yonkers branch. To the west is the main line to Chicago, known as the Hudson Division, also electrified, which extends into Grand Central Station. To the east is the aforementioned Putnam Division, with which the Yonkers branch physically connects, and which, except for the portion south of Van Cortlandt Park Junction, is steam-operated. On each of these two lines and on the Yonkers branch there are four or five station stops in Yonkers. The stops on the Yonkers branch are situated from .3 to .9 of a mile's distance from the nearest station on one of the other branches.

In the past, while there has been some local passenger traffic on the Yonkers branch, most of the passengers have been commuters between Yonkers and Grand Central Station, and there is nothing in the Commission's report to show that interstate passengers are carried by this branch. These commuters, for the most part, transferred from the Yonkers branch to trains on the Hudson Division at either High Bridge or University Heights to continue into Grand Central Station. A smaller number used the Yonkers branch trains to Sedgwick Avenue. From there, prior to the recent abandonment of the Sixth and Ninth Avenue Elevated Railways, passengers had direct service via these elevated lines to downtown New York. Since these abandonments, however, passengers at Sedgwick Avenue must use the shuttle to 155th Street and then take the Eighth Avenue subway to downtown New York.

The Commission found that there had been a steady dropping off of business on the Yonkers branch until it was only 25 percent of that 12 years ago. It pointed out that improved alternative methods of transportation between Yonkers and New York, and the abandonment of the Sixth and Ninth Avenue Elevated, had contributed to this loss of patronage. It was found that while the commuter traffic on other divisions of the New York Central had increased nearly 12 percent during the past year, the commuter traffic on the Yonkers branch had increased only 2.87 percent.

and that nothing pointed to any substantial future increase. Weighing the average income derived from this branch in 1940 and 1941 against the expenses of operation, the Commission found that the estimated annual loss to the carrier from this operation was \$56,941. In reaching the income figures employed, the Commission credited the line with all revenue earned from local passengers, as well as with all revenue earned by the system on passengers originated by the line and continuing on to downtown New York on other branches. The Commission found that there were alternative, though somewhat less convenient, methods of transportation to downtown New York for commuters now relying on the Yonkers branch. Thus, they could take a bus to stations on the Hudson Division and then the Hudson Division trains downtown. Or they could take a Broadway trolley to various subways and the subways downtown. The president of the local bus company testified that his company would put on two additional buses which he believed would accommodate any additional bus passengers resulting from an abandonment of the line. It was found that the traffic on the trolley line was light and that substantially more passengers could be accommodated by it without difficulty. The Commission concluded that the line was being operated at a substantial loss; that there was no prospect of more favorable results for the future; that continued operation would impose an undue bur-

den upon interstate commerce and the New York Central Railroad; and that the present and future public convenience and necessity would permit the abandonment of the Yonkers branch.

Appellants made a twofold attack upon this order in the District Court. First, it was asserted that for several reasons the Commission lacked jurisdiction to permit this abandonment and that its action interfered with the jurisdiction of the New York Public Service Commission over intrastate operations. Secondly, it was said that the full Commission abused its discretion and denied appellants a fair hearing by refusing to grant their petition for rehearing to enable them to introduce certain newly discovered evidence as to changed circumstances alleged to be material. It is submitted that these contentions present no substantial question of law and that the decree of the District Court should therefore be affirmed without argument.

1. Appellants contended, first, that the Yonkers branch was removed from the Commission's abandonment jurisdiction by the language of Section 1 (22) of the Interstate Commerce Act (49 U. S. C. sec. 1 (22)) exempting from the control of the Commission "street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." That this argument is merely an afterthought is demonstrated by the fact that

it was only raised before the Commission in the petition for rehearing. For that reason, the Commission's report contains no discussion of this point. Appellees, nevertheless, admitted before the lower court that this contention raised a jurisdictional issue of fact which the statutory court was permitted to decide on evidence *de novo*, under the doctrine enunciated by this Court in *United States v. Idaho*, 298 U. S. 105. The court below examined the question and found that there was no doubt that this line was operated as part of the New York Central system and that the Commission accordingly had jurisdiction. The court made detailed supporting findings in this connection, stating in part:

The use of part of the Putnam tracks, the transfers given to other parts of the line, the general repair and maintenance of the branch, and other details of operation—all appear intertwined with the operation of the system as a whole.

The fact that ownership, management, operation, and control of the Yonkers branch are all vested in the New York Central clearly demonstrates the correctness of the court's conclusion that it is operated as part of that steam railroad system. The Commission has consistently recognized that the existence of steam railroad ownership, management, and control, through stock ownership or otherwise, is the principal criterion to be con-

sidered in determining whether an electric line is operated as part of a steam railroad system within the meaning of this and comparable exemptions. *Unified Operation at Los Angeles Harbor*, 150 I. C. C. 649, 661; *Hudson & Manhattan R. Co.*, 216 I. C. C. 745, 752; *Pittsburgh L. & W. R. Co. Practices*, 227 I. C. C. 73, 101; *Interurban Electric Ry. Co.*, 227 I. C. C. 589; *New York, Westchester & Boston Ry. Co.*, 218 I. C. C. 253.²

The determination of the District Court, like that of the Commission under comparable circumstances, is a factual one, not to be disturbed on appeal, where, as here, there is any substantial evidence and a rational basis to support it. *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177. As a consequence, it is unnecessary to consider whether this line is more than a "street, suburban, or interurban electric railway" and hence, for a further reason, not within the exemption of Section 1 (22) of the Act, but it plainly is such. *Hudson & Manhattan R. Co. v. Hardy*, 103 F. (2d) 327 (C. C. A. 2), certiorari denied, 307 U. S. 640; *Sprague v. Well*, 122 F. (2d) 128 (C. C. A. 7), certiorari denied, 314 U. S. 669; cf. *United States v. Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1.

² The Commission held in the *Interurban Electric* and *Westchester* cases, *supra*, on much less convincing facts than exist here, that the electric lines involved were parts of a steam railroad system. There the electric lines were separate corporations, but their stock to a large extent was owned or controlled by a steam railroad.

Secondly, appellants stated that the Commission had no jurisdiction because the Yonkers branch is located wholly in New York State and carries only intrastate passengers. It was further suggested that the Commission's order illegally interfered with the jurisdiction of the New York Public Service Commission, whose consent it is said is required by statute for the discontinuance of stations in intrastate operation. But the language of the Interstate Commerce Act makes it clear that the Commission had jurisdiction and that the New York Public Service Commission must bow to the dictates of the federal agency. Thus Section 1 (18) (49 U. S. C. sec. 1 (18)) requires a carrier subject to the Interstate Commerce Act to secure the Commission's approval before abandoning any portion of its line. Obviously the New York Central is an interstate carrier subject to the Commission's jurisdiction, and the Yonkers branch is a portion of its line. Furthermore, Section 1 (20) (49 U. S. C. sec. 1 (20)) provides that when a carrier has secured a certificate from the Commission, it may abandon "without securing any approval other than the certificate." This indicates that Congress intended to make the jurisdiction of the Commission exclusive. In any event, this Court has settled the question by holding that the Commission has jurisdiction to authorize the abandonment of intrastate operations on a branch located entirely in a single State, when they are carried on by an

interstate carrier, and when the operations are found to burden interstate commerce. *Colorado v. United States*, 271 U. S. 153; *Transit Commission v. United States*, 284 U. S. 360; cf. *Texas v. Eastern Texas Ry.*, 258 U. S. 204.

It is said that because the New York Central's operations, taken as a whole, are profitable, the unprofitable operations on the Yonkers branch could not as a matter of law result in burdening interstate commerce and, for this third reason, the Commission was without jurisdiction. However, both the Commission and the courts have consistently recognized that such a financial condition does not prevent the authorization of abandonment of unprofitable operations. *E. g.*, *Transit Commission v. United States*, 284 U. S. 360, 370; *Purcell v. United States*, 41 F. Supp. 300, 313 (Md.); affirmed, 315 U. S. 381; *Town of Inlet v. New York Central R. Co.*, 7 F. Supp. 781 (N. D. N. Y.). The function of the Commission in a case of this type is to weigh the disadvantages to a local community and intrastate commerce from an abandonment against the burden which continued operation will throw upon interstate commerce. *Colorado v. United States*, 271 U. S. 153, 168. Here it has done just that and concluded that the benefit to the New York Central Railroad outweighs the resulting injury to Yonkers commuters. The ultimate issue of public convenience and necessity is a factual one; and

where, as here, there is a rational basis and substantial evidence to support the Commission's conclusion, its decision must be affirmed. *Purcell v. United States*, 41 F. Supp. 309, 314 (Md.), affirmed, 315 U. S. 381; *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F. (2d) 554, 559 (App. D. C.), certiorari denied, 305 U. S. 613; *Davidson Transfer and Storage Co. v. United States*, 42 F. Supp. 215 (E. D. Pa.), affirmed, 317 U. S. 587.

2. As to the contention that appellants were denied a fair hearing because their petition for rehearing was denied, the District Court's decision disposes of the issue so well that we merely repeat here what it said:

Denial of a rehearing was clearly within the Commission's discretion, 49 U. S. C. A. sec. 17 (6); the claimed additional evidence was not of the kind to persuade to a different conclusion. The evidence was claimed to show that a New York subway would be extended to the terminus of the Yonkers Branch, that Yonkers and New York could or would reduce tax assessments, and that the present crisis in gasoline would reduce bus transportation. But the City of New York, which favored abandonment, showed that building of the subway extension was at best a matter for the quite indefinite future and there was no hope of tax abatement there; and if prospects of lessened taxes in Yonkers were brighter, at most the

reduction would be less than \$9,000 per year. And there were alternative methods of transportation not dependent upon bus service. The suggestion that this loss may be used to reduce Central's excess-profits tax suggests interesting possibilities for keeping declining roads alive; it may, however, be safely left with the Commission. The Commission had already allowed plaintiffs a full hearing, although not required by law to do so. *Woodruff v. United States*, D. C. Conn., 40 F. Supp. 949; 49 U. S. C. A. secs. 1 (1) (a), 20a (6). Its denial of a further hearing cannot, therefore, be attacked here. * * *

For the foregoing reasons, it is submitted that the decree of the District Court should be affirmed.

CHARLES FAHY,

Solicitor General.

J. STANLEY PAYNE,

Asst. Chief Counsel,

Interstate Commerce Commission.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS
PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, ETC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND THE NEW YORK
CENTRAL RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM OF THE NEW YORK CENTRAL
RAILROAD COMPANY IN SUPPORT OF MOTION
TO AFFIRM.

THOMAS P. HEALY,

HAROLD H. McLEAN,

*Counsel for The New York Central
Railroad Company, Appellee.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 109

PUBLIC SERVICE COMMISSION OF THE STATE
OF NEW YORK (STATE DIVISION, DEPARTMENT OF
PUBLIC SERVICE), CITY OF YONKERS, AND JOHN W.
TOOLEY, JR., AS THE CHAIRMAN AND PRESIDING OFFICER
OF COMMITTEE OF YONKERS COMMUTERS, A VOLUNTARY
UNINCORPORATED ASSOCIATION COMPOSED OF MORE THAN
SEVEN MEMBERS,

Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA AND THE NEW YORK
CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

**MEMORANDUM OF THE NEW YORK CENTRAL
RAILROAD COMPANY IN SUPPORT OF MOTION
TO AFFIRM.**

The New York Central Railroad Company joins in the motion to affirm filed by the United States of America and the Interstate Commerce Commission under Rule XII. The facts of the case and the applicable law will be dealt with in the papers filed on behalf of the United States of America and the Interstate Commerce Commission. This

memorandum will be devoted to a statement of matters of record tending to show that the line sought to be abandoned is not a suburban or interurban electric railway within the intendment of Paragraph 22 of Section 1 of the Interstate Commerce Act, and, in any event, is operated as a part of a general steam railroad system of transportation.

It appears from the record that:

1. The New York Central Railroad Company is a steam railroad system of transportation.

2. The Board of Directors of The New York Central Railroad Company in the resolution of April 22, 1942, authorizing the institution of the proceeding (Ex. A of bill of complaint, p. 5) describes the line to be abandoned as

* * * that portion of the Putnam Division of the New York Central Railroad, known as the Yonkers Branch, extending from the main line of the Putnam Division at Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, N. Y., a distance of 3.1 miles. * * *

3. The Return to Questionnaire shows on page 2 thereof (Ex. A of bill of complaint) that from February 1, 1894, to March 7, 1913, the line was operated by The New York Central and Hudson River Railroad Company, and that on the latter date the lessor company, The New York and Putnam Railroad Company, was merged with The New York Central and Hudson River Railroad Company which Company was, in turn, merged with The New York Central Railroad Company in 1914, and further that:

* * The line proposed to be abandoned has been operated as a part of the Putnam Division of the applicant since applicant's formation in 1914. * *

4. The answer to question 11 of the Return to Questionnaire (pages 5 and 6) sets forth that Yonkers Branch trains operate over rails of the Putnam Division to Sedgwick Avenue and that there are transfer arrangements with Hudson Division trains operating to and from Grand Central Terminal and other stations.

5. Schedules of certain Hudson Division trains are adjusted to accommodate patrons of trains on the branch sought to be abandoned (Record before the Interstate Commerce Commission, p. 121).

6. The answer to question 14 of the Return to Questionnaire (page 11) shows a net annual system loss of \$71,932 on account of the branch, a loss borne by The New York Central Railroad Company.

7. The answer to question 15 of the Return to Questionnaire (page 11) shows that the line was electrified in 1926, which was after the effective date (February 28, 1920) of that portion of the Interstate Commerce Act involved herein. There is no indication here or throughout that the electrification made any change in the long established relationship of the branch to the New York Central System.

8. Tickets sold to and from stations on the Branch have optional privileges permitting use of the tickets at nearby stations on other New York Central lines (Exhibit 6 before the Interstate Commerce Commission).

9. The multiple unit electric cars used on the Branch are of the same type as other cars used in the metropolitan area and are needed to render service on other lines (Record before the Interstate Commerce Commission, p. 99).

10. The train crews used on the Branch are out of a common pool also serving the steam operated Putnam Division, many employees performing, during one trick of duty, service on both lines (Record before the Interstate Commerce Commission, p. 110).

Respectfully submitted,

THOMAS P. HEALY,

HAROLD H. McLENN,

Attorneys for Appellee.

The New York Central Railroad Company.

June 17, 1943.

(6819)

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS AND JOHN W. TOOLEY, JR., AS
PRESIDENT OF COMMITTEE OF YONKERS COM-
MUTERS, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, AND THE NEW YORK
CENTRAL RAILROAD COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE
INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court (R. 381-385) is reported in 50 F. Supp. 497. The report of the Interstate Commerce Commission (R. 72-78) has not yet been published.

JURISDICTION

The final decree of the district court was entered on June 10, 1943 (R. 385). The petition

for appeal was filed and allowed on June 11, 1943 (R. 338, 391-392). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a) and under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on June 21, 1943 (R. 400).

STATUTE INVOLVED

The relevant provisions of Part I of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 26-28.

QUESTIONS PRESENTED

The questions presented are:

1. Whether an order of the Interstate Commerce Commission authorizing the abandonment of a branch line of railroad was within the Commission's jurisdiction under Section 1 (18)-(20) of Part I of the Interstate Commerce Act, or whether it was beyond the Commission's authority on the ground that the line was a suburban or interurban electric railroad not operated as a part of a general steam railroad system of transportation and excluded by Section 1 (22) from the Commission's power over abandonments.

2. Whether the order is invalid on the ground that while the operation of the branch in question concededly resulted in a loss to the carrier, the

general operations from the system as a whole were profitable.

3. Whether the Commission exceeded its discretion in denying a petition for rehearing.

STATEMENT

On August 20, 1942, the New York Central Railroad Company filed an application (R. 10-30) with the Commission for a certificate of public convenience and necessity, under Section 1 (18) of Part I of the Interstate Commerce Act, which would authorize it to abandon a branch line extending 3.1 miles from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, N. Y. (R. 72).

A hearing was held upon the application, at which the Public Service Commission of the State of New York, the City of Yonkers, and a committee of Yonkers commuters appeared as protestants. The City of New York appeared in support of the application. (R. 176.) Brief were subsequently filed, and an examiner's proposed report was issued (R. 31-37), to which exceptions were filed by the protestants (R. 37-61), and the matter was orally argued before the Commission, Division 4 (R. 349-370). On March 20, 1943, the Commission, Division 4, issued its report finding that the present and future public convenience and necessity permit the abandonment (R. 71-78). With the report, it issued the order and certificate here challenged (R. 78-79).

The branch in question, known as the Yonkers branch, is part of the New York Central's Putnam Division, with which it connects at Van Cortlandt Park Junction, in Bronx County, New York City (R. 13, 72, 181, 332, 333, 348A). The Putnam Division connects with the Hudson Division, which is part of the main line from New York to Chicago (R. 181, 251).. The Hudson Division proceeds north from Grand Central Station to the Harlem River, then veers west to the Hudson and follows the east bank of the Hudson through Yonkers to Albany. The Putnam Division extends north from Sedgwick Avenue Station, at Sedgwick Avenue and West 161st Street in New York City, through Yonkers to Brewster. The tracks of the Putnam and Hudson divisions are immediately adjacent between Sedgwick Avenue and West 191st Street. (R. 332, 348A.) Two stations along this stretch, High Bridge and University Heights, serve both divisions (R. 188). North of 191st Street, the Putnam Division is east of and roughly parallel with the Hudson Division. In the City of Yonkers, the two divisions are approximately one mile apart. The Yonkers branch is between the Hudson and Putnam divisions. It extends northwestwardly from Van Cortlandt Park Junction (a point in Van Cortlandt Park opposite West 250th St.) to Getty Square in Yonkers. Getty Square is 0.3 mile east of the Yonkers station on the Hudson Division. (R. 17, 19, 72, 73, 332, 348A.)

The New York Central system is for the most part operated by steam (R. 382-383). Some portions of its lines are electrified, including the Hudson Division between Grand Central Station and Harmon, N. Y., the Harlem Division as far as White Plains, N. Y., the Putnam Division between Sedgwick Avenue and Van Cortlandt Park Junction, and the Yonkers branch (R. 72, 77, 182, 186, 187, 351, 370B).

The Yonkers branch has not handled freight traffic in many years; no industries are dependent upon it for freight service (R. 72, 19-20, 208). It is operated exclusively for passenger traffic, principally commuter travel between the four stations on the branch in Yonkers—Getty Square, Park Hill, Lowerre, and Caryl—and Grand Central Station, New York City (R. 209, 382-383, 19, 72, 73). Because of the congested condition of the main-line tracks south of Mott Haven Junction at 149th Street, which must accommodate numerous suburban trains to points on both the Hudson and Harlem divisions, as well as through express trains, trains serving stations on the Yonkers branch do not proceed to Grand Central Station (R. 210, 250-252). They run from Getty Square to Van Cortlandt Park Junction, thence over the main line of the Putnam Division to the terminal at Sedgwick Avenue. Passengers from stations on the Yonkers branch to Grand Central Station must transfer to Hudson Division trains at either

High Bridge or University Heights stations. (R. 19, 72, 188, 348A.)

With the abandonment and dismantling of the branch, train operations between Getty Square and Sedgwick Avenue would be discontinued (R. 76). The electrical installations between Sedgwick Avenue and Van Cortlandt Park Junction would also be dismantled, but this part of the Putnam Division would not be otherwise disturbed, and steam operations on the Putnam Division would continue (R. 182).

Patronage on the branch has steadily diminished (R. 24). At present, the total volume of business, approximately 600 passengers in each direction daily, is only about 25 percent of that twelve years ago (R. 77, 205-206, 335). This decline in volume is reflected by the reduction in train service. In 1926, when the branch was electrified (R. 182), 71 trains were operated daily. Between then and 1938, because of the steady decline in patronage, the number of trains was reduced from time to time to 17 in each direction. (R. 72-73, 189.) It was anticipated that the change from steam to electric operation in 1926 would result in increased patronage, but instead there was a material decline (R. 182, 73).

As a result, operation of the branch has become unprofitable. The total revenues for the year 1940 were \$49,603, as against expenses of operation of \$106,632 (including \$34,557 for taxes but nothing for overhead expenses), resulting in an

out-of-pocket loss of \$54,889. The average loss for the years 1940-1941, as found in the Commission's report, was \$56,941. (R. 75-76, 21-24, 198-205, 249.)

Abandonment of this branch would not affect regular passenger and freight service to and from Yonkers by the remaining lines of the New York Central, nor would it leave Yonkers without commutation service into New York City (R. 72-74, 383). The New York Central would continue to render its present commutation service from its four Hudson Division stations in Yonkers, namely, Ludlow, Yonkers, Glenwood and Greystone, and its present commutation service on its Putnam and Harlem divisions would also be continued. On the Putnam Division there are six stations within Yonkers: Lincoln, Dunwoodie, Bryn Mawr, Nepperhan, Gray Oaks, and Nepera Park. Just east of Yonkers there are five stations on the Harlem Division: Wakefield, Mt. Vernon, Fleetwood, Bronxville, and Tuckahoe. (R. 17, 73; 181-182.) The Harlem Division extends northerly from the junction with the Hudson Division at E. 149th Street to a junction with the Putnam Division at Brewster, paralleling both the Putnam and Hudson Divisions. It skirts the city limits of Yonkers on the east. (R. 73, 348A.) The stations on the Yonkers branch are within 0.3 to 1 mile from the nearest stations on these other lines (R. 72, 348A).

Bus lines operate from points near the stations on the Yonkers branch to stations on the Hudson Division. The use of these buses in connection with frequent train service on the Hudson Division constitutes a feasible alternative route to Grand Central Station. There are other alternate routes to downtown New York, including a trolley line which operates from Getty Square along Broadway, passing close to the Park Hill, Lowerre and Caryl stations, to the Broadway subway at 242nd Street. (R. 73-74, 191-198, 228-238, 257-264.)

Upon these and other facts shown in the report, the Commission found "that the line in question is being operated at a substantial loss to the applicant, and that there is no prospect of more favorable results for the future. Continued operations would impose an undue and unnecessary burden upon the applicant and upon interstate commerce." (R. 78.)

Petitions for rehearing were filed by the protestants (R. 79-100), to which replies were submitted by the New York Central and the City of New York (R. 100-109). After consideration by the entire Commission, the petitions were denied (R. 110).

Suit to enjoin the order was filed shortly thereafter by the protestants (R. 1), and a hearing was held before a statutory three-judge court (R. 118). Of the various grounds of invalidity alleged in the complaint (R. 1-10), only three were urged in

the court below, *viz.*, that the Commission lacked jurisdiction because the branch was an interurban electric railway within the exemption of Section 1 (22); that the evidence was insufficient to support the conclusion that continued operation of the branch would constitute an undue burden on interstate commerce; and that there was a lack of a fair hearing because the Commission denied appellants' petitions for rehearing (R. 123-140).

On June 10, 1943, the court rendered its opinion (R. 381) finding the order to be valid and dismissing the bill. A direct appeal was taken to this Court. The Public Service Commission of the State of New York, one of the plaintiffs below (R. 380), did not join in the appeal. (R. 388.)

On June 11, 1943, the court below granted a temporary stay of the Commission's order only until application therefor could be made to this Court (R. 387-388). On June 15, 1943, Mr. Justice Jackson denied a stay, and this Court subsequently refused to stay the order. Service on the branch was discontinued on June 30, 1943.

SUMMARY OF ARGUMENT

I

The court below held that the electric passenger line involved here was operated as part of an interstate general steam railroad system of trans-

Presumably, the rails and other facilities have been preserved in place pending determination of this appeal. In any event, no question of mootness is presented.

portation, and its holding is amply supported by the evidence. Hence, this branch is not within the exemption of Section 1 (22) of the Interstate Commerce Act.

Under Section 1 (20), it was unnecessary for the New York Central Railroad to secure the approval of the State commission before abandoning the branch.

Expressions in *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299, and *United States v. Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, relied upon by appellants, are inapplicable because those cases concern independently operated electric roads rather than roads operated as part of a general steam railroad system.

II

The validity of an order authorizing abandonment of an unprofitable branch does not depend upon whether the system operations are profitable as long as the branch operates at a substantial loss, thereby unduly burdening interstate commerce. *Colorado v. United States*, 271 U. S. 153; *Transit Commission v. United States*, 284 U. S. 360. Under the rule of these decisions, the Commission had regard for both intrastate and interstate commerce. It found that there were satisfactory alternate means of transportation, that the great decline in patronage of the branch resulted in operating the branch at a substantial

loss, that continued operation would impose an undue and unnecessary burden upon interstate commerce, and that the present and future public convenience and necessity permit the abandonment. These administrative findings were supported by substantial evidence and accordingly are not matters for "judicial redecision." *Purcell v. United States*, 315 U. S. 381, 385.

III

The denial by the entire Commission of the petitions for rehearing was clearly within the Commission's discretion. *United States v. Northern Pacific Ry.*, 288 U. S. 490. The additional evidence which appellants wished the Commission to consider at a rehearing was not of a sort to compel the Commission to grant a rehearing. *Baltimore & Ohio R. R. Co. v. United States*, 298 U. S. 349, 389.

ARGUMENT

I

THE BRANCH LINE IS OPERATED AS A PART OF "A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION" AND IS NOT, THEREFORE, WITHIN THE EXEMPTION OF SECTION 1 (22) OF THE INTERSTATE COMMERCE ACT

Section 1 (18)-(20) of Part I of the Interstate Commerce Act confers authority upon the Commission to issue certificates of public convenience and necessity authorizing any carrier subject to the Act to abandon "all or any portion" of its line

of railroad. Section 1 (22) provides that the authority so conferred shall not extend to the abandonment of "street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Appellants claim (Yonkers Br. 14-19; Tooley Br. 5-7) that the branch in question is an interurban electric railway, not operated as a part of a general steam railroad transportation system, and is, therefore, exempt from the Commission's jurisdiction under Section 1 (22). In the proceedings before the Commission, this question was neither presented *in limine* nor urged in the briefs, exceptions, or oral arguments. It was suggested for the first time, without supporting argument,

No serious challenge (cf. Tooley Br. 8) of the Commission's authority is made by appellants on the ground that the branch in question lies wholly within the State and that there is no affirmative showing of the movement of interstate commerce over the branch. In *Colorado v. United States*, 271 U. S. 153, the Court overruled the contention of the State that the Commission lacked power to authorize the carrier, whose railroad system was located partly in Colorado and partly in other States, to abandon the operation, in intrastate commerce, of a part of its line lying wholly within Colorado. The Court, distinguishing *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, sustained the power of the Commission on the ground that losses from the operation of the branch cast an undue burden upon interstate commerce. That controlling factor is present in the instant case. Cf. *Wickard v. Filburn*, 317 U. S. 111, 120, 123-124; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119; *United States v. Dallen*, 312 U. S. 100, 118; *Shreveport Rate Cases*, 234 U. S. 342.

in appellants' petitions to the Commission for reconsideration (R. 87, 96). The Commission's denial of the petitions indicates that it deemed the contention to be without merit. In the court below, this view was urged by appellants as their principal contention (R. 5, 124-130, 138). The court considered it in the light of the evidence in the Commission's record and certain evidence *de novo* received without objection (see R. 146, 168) on the part of defendants, since such a jurisdictional question may be determined by the reviewing court without prior administrative decision. *United States v. Idaho*, 298 U. S. 105; *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299; *Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266.

The three-judge court held, in view of the terms of Section 1 (22), that if an electric passenger line is operated as part of a general steam railroad system of transportation, its abandonment is within the Commission's power; the court entertained no doubt that this branch was so operated (R. 382).

This holding is amply supported by the evidence, which established the following facts. The branch is operated, not as an independent carrier as in the *Piedmont & Northern* case, nor even by a subsidiary company, but directly by the New

³ Although the point was not raised until after the issuance of the Commission's report, the findings of fact therein sufficiently indicate that the branch was operated as a part of the New York Central System (see R. 72, 76, 78).

York Central itself, as a branch line. It is not operated as a separate or detached segment, but in conjunction with other parts of the system. Constructed in 1888 by the New York & Northern Railway, it was operated under lease by the New York Central & Hudson River Railroad Company, predecessor of the New York Central Railroad Company, from 1894 to 1913, when it was merged with the lessee company. Since the formation of the New York Central Railroad Company in 1914, it has been operated by it as a part of its Putnam Division. (R. 13, 15.)

All trains operating on the branch also operate on that part of the Putnam Division between Van Cortlandt Park Junction and Sedgwick Avenue, and most of the passengers change to Hudson Division trains to complete their trips to Grand Central Station (R. 19, 73, 75, 76). All expenses of the operation of the branch are paid out of the general treasury, and the losses from the operation are borne by the New York Central (R. 20-24, 28-30, 199, 200-205). Tariffs of the New York Central provided for one-way, monthly-commutation and other tickets usable between stations on the branch and Grand Central Station (R. 344-345). Time tables of the New York Central publish schedules of service between Grand Central Station and stations not only on the Putnam Division between Sedgwick Avenue and Van Cortlandt Park but also on the Yonkers branch (R.

332-333). The operating results of the branch are reflected in the accounts of the New York Central (R. 21-24, 30, 76, 335).

Other facts shown by the evidence and found by the statutory court may be stated briefly. Operations on the Putnam Division, other than those between Sedgwick Avenue and Van Cortlandt Park Junction, are by steam (R. 382, 72, 351, 370B). The bulk of the traffic on the Yonkers branch transfers at High Bridge or University Heights to the New York Central's Hudson Division, where suburban trains run to and from the Grand Central Station on a through line whose ultimate end is Chicago (R. 382, 19, 75, 348A, 251). The suburban or intrastate trains on the Hudson Division are operated as part of the through steam railroad system to Chicago (R. 382-383, 251, 155, 156). So intimately connected is the Yonkers branch with the operation on the Hudson Division that seats must be provided on the Hudson Division trains for all the transferred Yonkers passengers for the short run from the end of the Yonkers branch to the Grand Central Station, whereas those same seats would be available for the Yonkers commuters at the Ludlow and Yonkers stations on the Hudson Division near the present terminus of the Yonkers Branch—the chief alternate means of transportation available for patrons of the Yonkers branch. In other words, the New York Central provided on the

Yonkers Branch service which was substantially duplicated for the passengers on its Hudson Division, concededly within the Commission's jurisdiction. (R. 383, 188-189, 159, 199.) The court further found that the Yonkers branch was in fact operated by the railroad as a part of its Putnam Division and its general system and that "The use of part of the Putnam tracks, the transfers given to other parts of the line, the general repair and maintenance of the Branch, and other details of operation—all appear intertwined with the operation of the system as a whole" (R. 382, 155-156, 19, 224-225).

The branch is clearly "a portion" of a line of railroad subject to Part I of the Interstate Commerce Act within the meaning of Section 1 (18), and is thus one which could not lawfully be abandoned without a certificate of public convenience and necessity issued by the Interstate Commerce Commission, in view of Section 1 (20) which provides in part:

From and after issuance of such certificate, and not before, the carrier by railroad may.

* The certificate here in question authorizes a complete abandonment of the Yonkers branch, involving dismantlement and salvaging, and not a mere curtailment or partial discontinuance of service under continued operation of the line. The latter situation has been held to be outside the purview of the abandonment provisions of Section 1 (18). *Proposed Abandonment, Morris & Essex Co.*, 175 I. C. C. 49; *Public Convenience Application of Kansas City Southern Ry.*, 94 I. C. C. 691. Cf. *Palmer v. Massachusetts*, 308 U. S. 79, 85.

without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. * * *

The phrase "without securing approval other than such certificate" indicates that if the carrier is one engaged in interstate commerce and therefore "subject to this part" (sec. 1 (18)), as in this case, it need not obtain approval of the State commission or any other authority, and that the jurisdiction of the Interstate Commerce Commission in the premises is exclusive. *Colorado v. United States*, 271 U. S. 153, 168; *Transit Commission v. United States*, 284 U. S. 360; *Purcell v. United States*, 315 U. S. 381; cf. *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, see 2 Sharfman, *The Interstate Commerce Commission* (1931), pp. 264-269.

There are no facts of record that lend support to appellants' contention that the Yonkers branch is operated separately or independently from other parts of the New York Central's system. Their reliance is upon certain expressions in cases such as *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299, and *United States v. Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, stressing electric interurban and suburban passenger service, among others, as significant factors to be considered. But cases such

as these involving the status of independently operated electric roads not operated as a part or parts of a general steam railway system of transportation are inapposite here.

As the branch is clearly operated as a part of the New York Central system, it is not within the exemption of Section 1 (22). The court below thus did not err in holding that the Commission had jurisdiction in the premises.

II

PROFITABLE SYSTEM OPERATIONS CONSTITUTE NO BAR TO THE ABANDONMENT OF AN UNPROFITABLE BRANCH

* Appellants contend (Tooley Br. 8-9; Yonkers Br. 20-22; R. 390) that, under the circumstances presented, the estimated annual loss which the Commission found (R. 76) would result from continued operation of the Yonkers branch, \$56,941, could not as a matter of law constitute an undue burden upon interstate commerce.

The contention implicitly assumes that though the branch in question lies wholly within a State, it is operated by an interstate carrier, and that the losses from its operation constitute a burden upon interstate commerce to the extent found by the Commission. This contention also assumes that if the operations of the carrier as a whole were unprofitable, this particular loss would constitute a burden *pro tanto* upon interstate com-

merce, which the Commission might find to be undue in view of the decision in *Colorado v. United States*, 271 U. S. 153.⁵

The argument is predicated upon the fact that the carrier's operations as a whole are profitable. It is true that at the present time the carrier's aggregate revenues are large,⁶ due, no doubt, to the carriage of war traffic.⁷ But the validity of an order authorizing abandonment of an unprofitable branch does not depend upon whether system operations as a whole yield either a profit or a loss. The purpose of the abandonment provisions is to enable interstate carriers to avoid losses from unprofitable lines, upon the authorization of the Commission and without the concurrence of State authorities. Adopted in 1920 and carried forward in the Transportation Act of 1940 (54 Stat. 898, 919), they sought, in conjunction with numerous

⁵ In that case, this Court sustained the power of the Commission to authorize abandonment, as to intrastate commerce, of a branch of an interstate carrier lying wholly within a State, on the ground that "control is exerted" by Section 1 (18)-(20) of the Interstate Commerce Act "over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens * * * found to result from operating a branch at a large loss" (271 U. S. 163).

⁶ In 1939, the New York Central's net income was \$4,509,236, in 1940, \$11,265,084, and in 1941, \$26,245,562, and for the first five months of 1942, \$11,351,125. In 1938, the operations resulted in a deficit of \$20,154,357. (R. 29.)

⁷ Cf. *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523, 543, declining to assume that figures of war earnings could serve as a reliable criterion for the "indefinite future."

other provisions, to strengthen the national railway transportation system. *Texas v. United States*, 292 U. S. 522, 530-532, and cases cited; *United States v. Louisiana*, 290 U. S. 70, 73-75; *Transit Commission v. United States*, 289 U. S. 121, 127; *Colorado v. United States*, 271 U. S. 153, 162-165; see also *Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277-278. As stated in *Chesapeake & Ohio Ry. v. United States*, 283 U. S. 35, 42, the purpose of the construction and abandonment provisions is "to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service." This purpose could not be fully accomplished if the abandonment provisions were restricted to carriers whose system operations as a whole are unprofitable. The provisions have not been so interpreted either by the Commission or by this Court. In the *Colorado* case, it was unsuccessfully contended (see 271 U. S. 166) by the State that the order authorizing abandonment was void, insofar as it related to intrastate commerce, because the Commission had failed to find, *inter alia*, that the company would be prevented from earning a fair return on the value of its properties as a whole. Speaking for the Court, Mr. Justice Brandeis observed that (271 U. S. 167-169) the sole test prescribed by the Act is that the abandonment be consistent with public convenience and necessity and that in determining

such a question, the Commission must have regard to the needs of both interstate and intrastate commerce.

In *Transit Commission v. United States*, 284 U. S. 360, 370, sustaining a certificate of the Commission authorizing the abandonment by the Long Island Railroad Company of a portion of its Whitestone branch, in which it was urged that the carrier's system, as a whole had large earnings and was a successful enterprise, the Court, referring to the *Colorado* case, held that the carrier need not claim "that immediate abandonment of the local branch was necessary to enable the carrier to earn a reasonable return on its investment."

In the present case, the Commission had regard for the needs of both intrastate and interstate commerce. It found that there are several alternate means of transportation from Yonkers to New York City that are convenient and economical; that patronage of the branch has greatly declined with the result that the branch is now operated at a substantial loss; that there is no prospect of more favorable business in the future; that continued operation would impose an undue and unnecessary burden upon the carrier and upon interstate commerce; and that the present

The finding that the continued operation would impose an undue burden upon the carrier and upon interstate commerce is supported by detailed evidence showing the total receipts from the operation of the branch, the actual expense of its operation, and the taxes thereon, and showing that the expenses exceed the revenues by \$56,941 annually (R. 76, 21-24; 201-205).

and future public convenience and necessity permit the abandonment (R. 73-75, 77, 78). These administrative findings, being supported by substantial evidence, are not matters for "judicial redecision." *Purcell v. United States*, 315 U. S. 381, 385; see also *Gray v. Powell*, 314 U. S. 402, 412, 413; *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251; *United States v. Maher*, 307 U. S. 148, 154; *Rochester Telephone Corp. v. United States*, 307 U. S. 125; *Shields v. Utah Idaho R. Co.*, 305 U. S. 177.

As the court below said (R. 383) :

Simply because the Central was generally prosperous does not mean that the Commission could not authorize the abandonment of a losing branch; otherwise a railroad would stand committed to drains upon its income for costly and unnecessary service until complete bankruptcy intervened.

III

DENIAL OF THE PETITIONS FOR REHEARING WAS WITHIN THE COMMISSION'S DISCRETION

Appellants and another protestant before the Commission, subsequent to the report of Division 4, filed petitions for rehearing to present additional evidence showing, *inter alia*, that a New York subway would be extended to a connection with the elevated shuttle near 155th Street,⁹ that

⁹ This subject had been considered in the Commission's report (R. 77-78).

the cities of Yonkers¹⁰ and New York would reduce tax assessments against the Yonkers branch, and that Governmental restrictions on the use of gasoline would cause curtailment of bus operations to local stations on the Hudson Division in Yonkers (R. 79-100). Replies opposing rehearing were filed by the New York Central and the City of New York (R. 100-109). Appellants claim (Tooley Br. 16; Yonkers Br. 11) that the Commission's denial of these petitions invalidates its order and violates the due process clause. The Commission may, of course, grant a rehearing, but in its judgment no sufficient reason was advanced for such action in this case.¹¹ Cf. *United States v. Northern Pacific Ry.*, 288 U. S. 490.¹²

The subway extension was one which the City of New York might construct after the end of the

¹⁰ *Idem.*

¹¹ In *Woodruff v. United States*, 40 F. Supp. 949, 953 (D. Conn.), a three-judge district court held that in a case of this kind the Commission is not required to grant any hearing to private parties. The court held that under the terms of Section 1 (19), in connection with Section 20a (6), the Commission is required to grant a hearing in abandonment proceedings only to the state authorities and the railroad. Cf. *Chicago Junction Case*, 264 U. S. 258, 265, note 10. It is unnecessary to decide this question here since the Commission accorded appellants a full and fair hearing.

¹² The present case bears no resemblance to *Atchison, T. & S. F. Ry. Co. v. United States*, 284 U. S. 248, which appears to be the only case where this Court annulled an order of the Commission upon proof of a change in conditions so fundamental that the refusal to receive further evidence was tantamount to a denial of the full hearing required in such a case.

war. If constructed, it would afford a connection, via the elevated shuttle, between the New York Central's Sedgwick Avenue station and the New York subway system. The suggestion was that if this subway extension were built, there would be an increase of patronage on the Yonkers branch, thereby making the branch operation profitable. (R. 93-95, 358-360.) However, the City of New York was unable to give any assurance that this extension would ever be constructed (R. 108, 160, 358, 380). Moreover, patronage on the Yonkers branch steadily declined over a twelve-year period, notwithstanding the existence of a connection between the Sedgwick Avenue station and the 6th and 9th Avenue elevated lines, which were not dismantled until 1938 and 1940, respectively (R. 77, 205-206, 73).

The petitions for rehearing stated that the City of Yonkers would reduce its taxes on the Yonkers branch property in the amount of approximately \$9,000 per annum (R. 86, 91, 95) and that the City of New York would make a reduction of \$10,000 per annum in its taxes against the branch (R. 95). The aggregate tax paid by the carrier on the branch in 1941 was \$34,557 (R. 76). Of this, \$23,598 was assessed by the City of Yonkers and \$10,959 by the City of New York (R. 109, 204). Counsel for the City of New York characterized the suggestion of a tax reduction of 90 percent from \$10,959 to \$1,000 as "mere wishful thinking" (R. 109; see also R. 161, 379). Even if the City of Yonkers granted a \$9,000 reduction in taxes,

the loss from the operation of the branch would still be substantial. (See Statement, *supra*, pp 6-7).

Concerning the gasoline curtailment, the president of the local bus company testified that if the Office of Defense Transportation required him to reduce his service 15 percent, he would probably curtail the service during the non-rush hour periods (R. 263). The record further established that there are other alternate routes not dependent on bus transportation (R. 72-74, 383, 384, 348A).

Consequently, it is apparent that none of the claimed additional evidence was of a sort to compel the Commission to grant a rehearing. *Baltimore & Ohio R. R. Co. v. United States*, 298 U. S. 349, 389.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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DANIEL W. KNOWLTON,

Chief Counsel,

Interstate Commerce Commission.

DECEMBER 1943.

APPENDIX

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (18) provides:

(18) No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this Act, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. (49 U. S. C. 1 (18).)

Section 1 (19) provides:

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates. (49 U. S. C. 1 (19).)

Section 1 (20) provides:

(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and

conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both. (49 U. S. C. 1 (20).)

* * * *

Section 1 (22) provides:

(22) The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation. (49 U. S. C. 1 (22).)

Supreme Court of the United States

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President of
Committee of Yonkers Commuters, etc.,

Appellants,

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION and THE NEW YORK CENTRAL RAILROAD
COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF OF APPELLEE, THE NEW YORK
CENTRAL RAILROAD COMPANY**

✓ THOMAS P. HEALY,

✓ HAROLD H. McLEAN,

Counsel for Appellee,

The New York Central Railroad Company.

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BRIEF OF APPELLEE, THE NEW YORK CENTRAL RAILROAD COMPANY

Opinions Below

The opinion of the specially constituted District Court (R. 380), *Public Service Commission of State of New York, et al. v. United States, et al.*, is in 50 F. Supp. 497.

The report of the Interstate Commerce Commission, dated March 20, 1943, in Finance Docket No. 13914 (R. 71), *New York Central Railroad Company Abandonment*, is not officially reported.*

* The Commission's mimeographed release of the report bears the legend "This report will not be printed in full in the permanent series of Interstate Commerce Commission reports."

Jurisdiction

The proceeding in the court below was commenced under the provisions of acts approved June 10, 1910 (38 Stat. L. 1149) and October 22, 1913 (38 Stat. L. 219), commonly referred to as the Commerce Court Act and the Urgent Deficiencies Act, Title 28 U. S. C. Section 41 (28) and Sections 43-48, inclusive, which have to do with suits brought to enjoin and set aside orders of the Interstate Commerce Commission.

The direct appeal from the final decree of the court below was taken to this Court under the provisions of Title 28, U. S. C. Sections 47a and 345.

Probable jurisdiction was noted by this Court on June 21, 1943 (R. 400).

Statutes Involved

The proceeding before the Interstate Commerce Commission was commenced under the provisions of Section 1(18) to (20), inclusive, of the Interstate Commerce Act (49 U. S. C. Sec. 1 [18] to [20]): These provisions, together with paragraph (22) of Section 1, which appellants claim to be applicable, are reproduced in the Appendix.

Statement

The Proceedings

The order under attack is in the form of a certificate of public convenience and necessity certifying "That the present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of the branch line of railroad in Bronx and Westchester Counties, N. Y., described in the aforesaid report. * * *" (R. 78-9). Neither the order nor the accompany-

ing report, which is made a part thereof, contain language purporting to authorize The New York Central Railroad Company to abandon any part of "an intrastate, inter-urban, electric passenger railway", as is inferred on page 1 of the brief of appellant, John W. Tooley, Jr.

Application to abandon the line, described as "a Line of Railroad between Van Cortlandt Park Junction, New York City, in the County of Bronx, and Getty Square, Yonkers, in the County of Westchester, State of New York", was made on August 20, 1943 (R. 11). Public hearing was held in the City of Yonkers before an examiner of the Interstate Commerce Commission on November 12, 1942 (R. 175). The Application and Return to Questionnaire were received* as a part of the record (R. 176), and applicant produced witnesses to amplify and explain the Return to Questionnaire, which in itself contains a full statement of the applicant's case (R. 14). Twenty-three witnesses, who were for the most part commuters on the line, appeared in opposition (R. 264, 274-331). The commuters were represented by a committee of which John W. Tooley, Jr., appellant here, was chairman (R. 287). The City of Yonkers and the Public Service Commission of the State of New York also appeared as protestants (R. 176). The City of New York appeared in support of the application (R. 108).

Four months after the oral hearing a proposed report was served upon the parties (R. 31). Various protestants filed exceptions to the proposed report (R. 37, 44, 57), and applicant filed a reply to the exceptions (R. 61), following which attorneys, including attorneys for appellants, presented oral argument before Division 4 of the Commission (R. 349, 358, 366). Appellants, as protestants

* Rule 19 of the Commission's Rules of Practice provides as follows:

"PLEADINGS PART OF RECORD. Recitals of material and relevant facts in a pleading, filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record."

before the Commission, raised no question as to the Commission's jurisdiction either in their written exceptions (R. 37-42, 44-52) or in their oral presentations (R. 358, 366). Their attacks were directed to factual matters and the proposed finding that continued operation of the line would impose an undue burden upon the applicant and upon interstate commerce.

The report of the Commission, Division 4, issued on March 20, 1943, adopted, substantially, the proposed report (R. 71). Appellants thereupon filed omnibus petitions (R. 79, 92) for further hearing, rehearing, etc., stressing that the Commission erred in finding that continued operation of the line would be a burden upon interstate commerce (R. 81), that the Commission had no jurisdiction because the line was entirely intrastate (R. 83), and that the case should be reopened to permit introduction of new evidence showing (1) possible reduction in assessed valuation of the line within Yonkers (R. 85), and (2) a plan to extend a certain New York City subway in the post-war period (R. 93). The claim, raised for the first time, that the line was an exempted interurban electric railway under Section 1(22) of the Interstate Commerce Act was not stressed (R. 87, 96).

In its reply to these petitions the applicant pointed out that the tax reduction was not a fact and would, at best, be uncertain, and that it offered too little and came too late (R. 106); that the suggested subway extension was speculative and remote, and would make little difference in the traffic volume (R. 104).

The Corporation Counsel of the City of New York also filed a memorandum in opposition to protestants' petitions for further hearing (R. 108).

Rehearing was denied on May 10, 1943 (R. 110), the Commission's order reciting that it was entered upon further consideration of the record and of "the petitions of

the protestants for rehearing and of the answers of the applicant and the City of New York to said petitions:"

The review proceeding in the court below, commenced on May 21, 1943, was heard on its merits on June 2, 1943 (R. 118). The Public Service Commission of the State of New York took the leading part in the court below (R. 123-136), but has not joined in the appeal before this Court.

The decision dismissing the bill of complaint was filed on June 10, 1943 (R. 380), and judgment was entered the same day (R. 385). The statutory court granted a temporary stay of proceedings to June 19, 1943, to permit application to be made to this Court for a further stay (R. 387). Such application was made but it was not granted. A motion to affirm under Rule 12 was denied and probable jurisdiction was noted by this Court on June 21, 1943 (R. 400).

Description of the Line and the Area Served by it

The location of the line to be abandoned, particularly its relation to other New York Central lines and transportation facilities which figure in the case, appears on the maps which are a part of the record (R. 332, 348A, 370B), particularly Exhibit 2 before the Interstate Commerce Commission (R. 332).

The Hudson and Harlem Divisions, the principal passenger carrying lines of the New York Central in the New York metropolitan area, use the same tracks from Grand Central Station to about 150th Street (Mott Haven Junction), which is north of the Harlem River. From this point the Harlem Division continues directly north, and, after it has gone through the Borough of Bronx, has several stations very close to the easterly boundary of the City of Yonkers (R. 182). The Hudson Division tracks turn in a westerly direction near 150th Street (Mott

Haven Junction), follow the north bank of the Harlem River to the Hudson River and thence along the east bank of the Hudson River through Yonkers to Albany (R. 181). This division has four stations, Ludlow, Yonkers, Glenwood and Greystone, within the limits of the City of Yonkers (R. 181). Only the first two stations are within the area involved in this case. The Hudson and Harlem Divisions are electrified within the New York metropolitan area.

The New York Central also has another less important line, known as the Putnam Division main line. The passenger trains of this division do not run into Grand Central Station, though there are connecting tracks to the Hudson Division (R. 210, 370B). Putnam Division tracks begin at Sedgewick Avenue station (161st Street), in the Borough of Bronx, parallel the Hudson Division tracks along the Harlem River through joint stations at High Bridge, Morris Heights and University Heights and then continue north through an area in the Bronx and the City of Yonkers half way between the Hudson and Harlem Division tracks. Excepting the line and the service involved in the abandonment proceeding, Putnam Division operations are entirely by means of steam (R. 182).

The line to be abandoned, here called the Yonkers Branch, is a part of the Putnam Division (R. 13). It was electrified in 1926 as the result of public pressure and state law (R. 182, 221).^{*} The line branches off the Putnam at Van Cortlandt Park Junction in Van Cortlandt Park, New York City, and proceeds in a northwesterly direction across the city line to Getty Square station in the heart of the Yonkers business district not far from Yonkers station on the Hudson Division. The stations to be abandoned are Caryl, Lowerre, Park Hill and Getty Square (R. 182).

^{*} The law was declared invalid by the United States District Court, Southern District of New York, in *Staten Island Rapid Transit Co. v. Public Service Comm.*, 16 F. (2d) 313, on account of conflict with Federal Safety Appliance Act.

Caryl and Lowerre are the most important (R. 223). The line from Van Cortlandt Park Junction to Getty Square which will be taken up is 3.1 miles long (R. 11, 180). It is laid with 100 and 105 pound rail (R. 182). Electrical devices on Putnam Division main line used in rendering through service from Sedgewick Avenue to Getty Square will also be removed (R. 182). Steam operations will continue over Putnam Division tracks formerly used jointly for steam and electric operations.

A connection was formerly afforded at the Sedgewick Avenue end of the line to the Sixth and Ninth Avenue elevated trains which crossed the Harlem River on a bridge used until 1916 to carry Putnam Division trains across the river and down to 155th Street on Manhattan (R. 184, 239). The elevated lines were dismantled in 1938 and 1940, leaving, however, a segment of the line extending from Jerome Avenue (Lexington Avenue subway) on the east past Sedgewick Avenue station and across the Harlem River on the old railroad bridge to another subway at 155th Street (R. 194). A so-called shuttle service is operated over this segment. The newly discovered evidence which the commuters sought to introduce at a rehearing had to do with a plan to extend, after the war, the end of the Lenox Avenue subway that now stubs at 145th Street to connect with the shuttle tracks at 155th Street, thereby restoring Sedgewick Avenue as a station on a through city transportation line (R. 93).

The Yonkers Branch, together with the balance of the Putnam Division, has been operated by the Central or predecessor companies for more than fifty years (R. 15). There was a lessor corporation in existence until its merger with The New York Central and Hudson River Railroad Company in 1913. The latter company was in turn consolidated with other companies to form the present company in 1914 (R. 15).

The competing transportation agencies or routes remaining in the field are chiefly: (1) the Broadway trolley line which runs west of and parallel to the Yonkers Branch for its entire length, providing access to a New York City subway at 242nd Street (R. 18, 191, 229-238); (2) the Club Transportation bus lines which provide service between the Caryl and Lowerre areas and Ludlow station on the Hudson Division (R. 18, 192, 257-264); and (3) the McLean Avenue trolley line which goes east to Lincoln station on the Putnam Division main line and proceeds still further to a connection with a New York City subway (Lexington Avenue line) at Woodlawn (R. 18, 192). The service offered by these agencies, though not quite as convenient as the Yonkers Branch service, is adequate and is reasonably priced.

Results of Operation

The additional patronage expected after the electrification in 1926 did not materialize (R. 24, 221). A decline commencing with the onset of the economic depression in the 1930s continued so that at the time of the hearing patronage was only 25 per cent of what it had been 12 years before (R. 24). The slight recovery as a result of the war boom and the rubber shortage has not been comparable to that experienced by applicant's other lines and by competing transportation agencies and offers no hope for the future (R. 24, 204).

Based upon average revenue and expense for the years 1940 and 1941, operation of the line produces a yearly out-of-pocket loss of at least \$56,941 (R. 24). This is a conservative statement of the loss (R. 100-103). The branch was given credit for all revenues from the sale of tickets to or from points on the Yonkers Branch without deduction of expense items connected with transporting the passengers on the Hudson Division (R. 205). Nor was any allowance made for revenue that will be retained on account of a substantial number of passengers using ap-

plicant's other lines upon abandonment of service on the Yonkers Branch (R. 205). See further in this connection applicant's reply to petitions for further hearing (R. 100-103).

Only 2.4 per cent of the traffic on the line is local to the part to be physically abandoned (R. 30, 199). 23.4 per cent is Sedgewick Avenue business and represents the portion making connection to city subways (R. 199). 62.9 per cent of the Yonkers Branch passengers transfer to or from points on the Hudson Division, principally Grand Central Station (R. 30, 199).

Evidence showing Line is Operated as a Part of a General Steam Railroad System

All Yonkers Branch passengers transferring to or from Grand Central Station must be accommodated on Hudson Division as well as Yonkers Branch trains (R. 30, 187-8). If after the abandonment Yonkers Branch passengers do not come over to Hudson Division stations and use Hudson Division trains direct to Grand Central, it may be possible to eliminate cars on certain Hudson Division trains (R. 205).

Twenty-eight of the thirty Yonkers Branch trains which make daily connections with Hudson Division trains do so at High Bridge station, and the other two trains (one in each direction) make connection at University Heights station (R. 188). Train schedules introduced as exhibits and testimony adduced at the hearing before the Commission show that service to points on the Yonkers Branch is provided by a co-ordination of Yonkers Branch and Hudson Division trains (R. 188, 252-4). The Yonkers Branch schedule furnished to the public shows the connecting Hudson Division trains on the same sheet (R. 332).

Tickets sold between Grand Central Station and points on the Yonkers Branch carry optional privileges per-

mitting use at certain stations on applicant's other lines in and near Yonkers (R. 224, 344). The published tariffs specify the options (R. 344). A ticket from Grand Central Station to Park Hill, for instance, is also good to Ludlow on the Hudson Division, to Mt. Vernon on the Harlem Division, and to Lincoln on the Putnam Division (R. 344).

The eleven multiple-unit cars, valued at \$235,000 (R. 24), used in rendering service on the Yonkers Branch are the same as those used on the Hudson and Harlem Divisions (R. 186). One reason for abandoning service at the present time is to permit fuller use of the cars on the other metropolitan divisions, thereby releasing an equivalent number of standard coaches now used on those divisions (R. 186-7, 238). The coaches to be released are needed to accommodate the high tide of civil and military traffic the railroads are now experiencing (R. 187). This feature of the case was fully explained in the oral argument before the court below (R. 156-160).

Employees who operate trains on the branch are in the same seniority district as employees who operate main line trains on the Putnam Division and the men operate both Putnam Division and branch line trains during one tour of duty (R. 204-5, 245-6).

The Commission's Report

Division 4 of the Commission wrote what the court below described as "a careful opinion" (R. 383). It contains a full recital of the pertinent facts and explains the basis of the Commission's action (R. 71-8). It would be unduly repetitious of what is already contained herein to detail what is said by the Commission. The court below reviewed the record and said, "Under the circumstances the evidence before the Commission was adequate, and the Commission's conclusion well within its authority" (R. 383).

By way of an index to the report rather than as a summary, it may be pointed out that the report gives a full description of the branch and its history (R. 72), the territory served (R. 72), the service now and formerly offered (R. 73), the service offered by, and the time consumed in, using other lines of the New York Central and those of competing agencies (R. 74-5), effect of abandonment upon real estate values in Yonkers (R. 75), number of passengers carried and financial results of operation—loss of \$56,941 per year (R. 75-6), material in the line, including 11 cars, that may be salvaged or released for use elsewhere (R. 77), and the decline of patronage to about 25 per cent of what it was 12 years ago (R. 77).

The ultimate findings of the Commission are as follows:

"It is apparent from the record that the line in question is being operated at a substantial loss to the applicant, and that there is no prospect of more favorable results for the future. Continued operation would impose an undue and unnecessary burden upon the applicant and upon interstate commerce.

"We find that present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of the line of railroad in Bronx and Westchester Counties, N. Y., described herein. An appropriate certificate will be issued, effective from and after 40 days from its date, in which suitable provision will be made for the cancellation of tariffs" (R. 78).

Summary of Argument

1. The Yonkers Branch is an electrically operated branch of a steam railroad. It is not, as appellants contend, a suburban or interurban electric railway excepted under Section 1(22) of the Interstate Commerce Act from the abandonment authority conferred upon the Commission by Section 1(18). The branch is not separately incorporated nor separately operated, has no officers, employees, records or funds of its own, and functions only as a branch of a steam railroad. The appellants' contention that the line is an electric railway not only disregards the facts of record, but is an overliteral interpretation of the language of Section 1(22) already repudiated by this Court in *Piedmont & Northern R. Co. v. Interstate Commerce Comm.*, 286 U. S. 299.

2. Even though it be assumed for purposes of argument that the Yonkers Branch is a suburban or interurban electric railway, it is nevertheless operated as a part of the New York Central's steam railroad system of transportation, and, on that account, is outside the exemption of suburban and interurban electric railways contained in Section 1(22). Many facts of record establish that the line is so operated, including that (1) the New York Central or its predecessors have operated the line for over 50 years; (2) schedules of Yonkers Branch trains are coordinated with schedules of main line trains; (3) a large proportion of the passengers using the branch not only require accommodations on branch line trains but also on trains operating upon the main line; (4) tickets used on the branch carry optional privileges permitting use on other lines; (5) the equipment used on the branch is the same as that used on other suburban lines and is needed to relieve a shortage of standard equipment required for the transportation of both civil and military traffic; (6) employees operating trains on the branch also work on the Putnam Division main line trains and the Yonkers Branch trains operate over the Putnam Division main line for part of their run; (7) the Board of

Directors of The New York Central Railroad Company considers the branch to be a part of its railroad; and (8) the Interstate Commerce Commission found the branch to be a part of applicant's line of railroad, and that its continued operation would constitute an undue and unnecessary burden upon the applicant and upon interstate commerce.

3. Appellants are in no position to complain about lack of findings in the Commission's report as to whether the branch is a suburban or interurban electric railway within the intendment of Section 1(22), since they offered no evidence thereon and requested no findings pertaining thereto. An established rule of statutory construction requires that where an exception appears in a different section or subdivision of a statute than does the enacting clause, as is the case here, the party relying on the exception must allege and prove that his case comes within it. This rule is especially applicable here because the report of the Commission contains all the affirmative findings necessary to an exercise of jurisdiction in the premises and the lack of a specific negative finding as to whether the line is a suburban or interurban electric railway does not affect the basis of the Commission's decision.

4. All other points raised by appellants have already been determined adversely to them by this Court in other cases. Whether, for instance, the continued operation of the line would impose an undue and unnecessary burden upon the applicant and upon interstate commerce, as found by the Commission, is not subject to rededecision by this Court. *Purcell v. United States*, 315 U. S. 381. The case raises no new or novel issues respecting conflict between state and federal authority which have not been fully disposed of in numerous cases, including *Colorado v. United States*, 271 U. S. 153, and *Transit Commission v. United States*, 284 U. S. 360. No substantial claims are raised as to lack of due process or fair hearing.

POINT I

The Yonkers Branch is not a suburban or interurban electric railway within the intendment of Section 1(22) of the Interstate Commerce Act.

Appellants maintain that the Commission's order authorizing abandonment of the Yonkers Branch is invalid on the ground that the line, though long owned and operated by The New York Central Railroad Company, is nevertheless a suburban or interurban electric railway and therefore exempted from the Commission's jurisdiction by Section 1(22). They claim that this branch line is such a railway because it runs in a suburban or interurban area, has electric power and carries only passengers. Such restricted or literalistic interpretation of the language of Section 1(22) has, however, been already repudiated by this Court in *Piedmont & Northern Ry. Co. v. Interstate Commerce Comm.*, 286 U. S. 299. It is there pointed out that the exemption in the statute must be construed so as to give effect to the broad purposes of the legislation of which it is a part and also with a view to the special position that electric railways had in 1920 when the legislation was passed.

Concerning the broad purposes of the Transportation Act of 1920 it is only necessary to refer to *Railroad Comm. of Wisconsin v. C. B. & Q. R. Co.*, 257 U. S. 563, 585, *New England Divisions Case*, 261 U. S. 184, 189, *Dutton-Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456, 478, *Texas & Pacific R. Co. v. Gulf, Colorado & Santa Fe R. Co.*, 270 U. S. 266, 277, and *Colorado v. U. S.*, 271 U. S. 153. These notable decisions established that the increased powers over intrastate rates, divisions, recapture of earnings, extension and abandonment of lines, etc., given to the Interstate Commerce Commission by the Transportation Act of 1920, are to be administered for the purpose of building up, in an affirmative way, a national transportation

system. In order to achieve this great purpose the railway systems of the country, in the language of the *Dayton-Goose Creek* opinion, were put more completely than ever "under the fostering guardianship and control of the Commission." One of the great concerns of Congress was to prevent the dissipation of railroad earnings in unprofitable local operations to the prejudice of interstate commerce. As was said in *Colorado v. U. S.*, *supra*, page 163:

* * * * Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. * * *

The special field that, suburban and interurban, electric railways occupied in 1920 when the Transportation Act of that year was passed has become, since the advent of the intercity bus line and the almost universal ownership of motor cars, hardly more than a memory. As is pointed out in the *Piedmont & Northern* decision, page 307, these organizations retained many of the characteristics of street car companies:

* * * * These are essentially local, are fundamentally passenger carriers, are to an inconsiderable extent engaged in interstate carriage, and transact freight business only incidentally and in a small volume. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distinct communities, and that in addition so-called interurban lines were constructed from time to time, to serve the convenience of two or more cities. But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars. Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along

the line or received for local delivery from connecting steam railroads. It is clear that the phrase 'interurban electric railway' was not, in 1920, commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars. It cannot be said, therefore, that if a railway is operated by electricity and extends between cities paragraph (22) clearly and unequivocally exempts it from the Commission's jurisdiction."

Appellants misconstrue the *Piedmont & Northern* decision when they attempt to apply the above quoted language to the facts of this case. True enough, the Yonkers Branch carries no freight, was built for passenger business, and is operated by means of single or series of self-propelled electric cars, but this does not make it an electric railway within the intendment of the statute.

A consideration of the precise language of the statute makes plain that the clause exempting electric railways covers a class of operating companies rather than a type of operation. The exemption is not, in other words, of electric operations as such, but of operations by electric railways, a very different matter. Paragraph (22) first provides that the authority conferred by paragraphs (18) to (21) shall not extend to "spur, industrial, team, switching or sidetracks, located or to be located wholly within one State * * *." The emphasis here is upon tracks and types of tracks that are excluded from the Commission's jurisdiction. Tracks over which electric operations are conducted are not expressly excluded and, indeed, there would be, in view of the purpose of the statute, no reason for excluding them. The next exception (though a limited one) is of "street, suburban or interurban electric railways * * *." It is, in striking contrast to the previous exception as to spur tracks, etc., a reference to operating companies. The entire operations of such companies, interstate and otherwise, are exempt, subject only to the further limitation,

treated later herein, about not being operated as a part or parts of a general steam railroad system of transportation.

The Yonkers Branch is not an electric railway within the intendment of Section 1(22) because it does not and cannot stand alone and apart as an electric railway. Its unified operation and long standing corporate identification with the New York Central Railroad make it so clearly a branch of that railroad that any other assumption is utterly unreal. Much that is said in Point II about the line being operated, in any event, as a part of the New York Central's system of steam railroad transportation is relevant here. The Yonkers Branch has no charter, officers, employees, records, funds or tariffs exclusively of its own, and has no being or existence apart from the New York Central. It makes no separate reports of its own to the Interstate Commerce Commission and functions only as a part of the New York Central. It has, as would any other branch line, certain exclusive tracks and facilities which may be surrendered or dismantled upon cessation of operations, but it is no more separate than any other branch of the New York Central, and is distinguished from other branches only by the incidental fact of electric operation which came about rather late in its career largely in response to an invalid statute.

It would thwart the national transportation policy, established by the 1920 legislation, to find the Yonkers Branch to be beyond the protective reach of the Interstate Commerce Commission's power under paragraphs (18) to (21) of Section 1. The Commission in the exercise of its informed and expert judgment has found that "Continued operation would impose an undue and unnecessary burden upon the applicant and upon interstate commerce." That finding should not be set aside upon any artificial conception of what constitutes an electric railway, a conception that has no regard for the meaning of the whole statute and disregards its broad purpose to promote and protect a national transportation system.

POINT II

Even though it be an electric railway, which appellees deny, the Yonkers Branch is operated as a part of a general steam railroad system of transportation, and Section 1(22) does not exempt it from the Commission's jurisdiction under Section 1(18) to (21).

The final clause of Section 1(22) restricts the exemption of electric railways to those "not operated as a part or parts of a general steam railroad system of transportation," thus recognizing that there are certain electric railways which, because of their relationship to steam railroads, are to be regarded as a part or parts of a steam railroad system of transportation. The exclusion of street, suburban and interurban electric railways as a class from the general application of this part of the Transportation Act of 1920 is in keeping with its broad purposes. Such lines are usually of local importance only. However, when such electric railways form a part or parts of a steam system of transportation, it is likewise in keeping with the broad purposes of the Act to limit the restriction. Otherwise electric railways would be free to play havoc with the national transportation system and policy.

The clause here involved, as is demonstrated in Point I, never comes into play in this case because the Yonkers Branch is not a suburban or interurban electric railway. It is an electrically operated branch of a steam railroad. Even if it be admitted, *arguendo*, that the Yonkers Branch is a suburban or interurban electric railway, it avails the appellants nothing because the branch is operated as a part of the New York Central Railroad, which is admittedly a general steam railroad system.

The Yonkers Branch is a part of the New York Central both by reason of its corporate and financial identification.

with the New York Central and by reason of its functional operation as a part of the New York Central.

While the record before the Commission was not made with the precise objective of proving that the Yonkers Branch was operated as a part of a general steam railroad system, since no such issue was suggested at the hearing, the record fully supports a finding that it was so operated. The record contains a full explanation of the past history and current operation of the line and necessarily discloses its relation to other parts of the New York Central Railroad.

The lower court reviewed the record before the Commission and concluded that authorization of the abandonment was within the jurisdiction of the Commission because the line was operated as a part of the New York Central Railroad. The lower court said:

“ * * * Here we have no doubt but that this railway was so operated. The facts that it was electric and furnished only passenger service and that it could not run over the remaining tracks of the Central's Putnam Division do not control the showing that it was in fact operated by the railroad as a part of that division and its general system. The use of part of the Putnam tracks, the transfers given to other parts of the line, the general repair and maintenance of the Branch, and other details of operation—all appear intertwined with the operation of the system as a whole.

“Without attempting to rehearse here all the significant facts, we may note, as an example of this interconnection, the fact that the bulk of the traffic on the Yonkers Branch transfers at High Bridge or University Heights to the Central's Hudson Division, where suburban trains run to and from the Grand Central Station on a through line whose ultimate end is Chicago. Plaintiffs expressly admit that the suburban or intrastate trains on the Hudson Division are parts of the through steam railroad system to Chicago. Yet so intimately connected is this Yonkers

Branch with the same operation that seats must be provided on the Hudson trains for all the transferred Yonkers passengers merely for the short run from the present end of the Yonkers Branch to the Grand Central Station, whereas those same seats would be available for the Yonkers commuters at the Ludlow and Yonkers stations on the Hudson Division near the present terminus of the Yonkers Branch—the chief alternate means of transportation available for the patrons of this Branch. In other words, the Central now provides on the branch in question service which is substantially duplicated for these passengers on its Hudson Division, concededly within the Commission's jurisdiction. It would be highly unrealistic to say that that duplicating service must be viewed as something apart from even the Hudson Division, not to speak of the Putnam Division, with which it shares trackage. We conclude that the Commission had jurisdiction in the premises" (R. 382-3).

While this is a complete answer to appellants' contentions, it may be helpful to supply the details supporting the court's pronouncements and to point out additional facts which are overwhelming in their implications. The record shows:

1. The Yonkers Branch has been directly operated by the New York Central or predecessor companies for more than 50 years (R. 15). The company which owned the line and leased it to the Central's predecessor up to 1913 was consolidated with The New York Central and Hudson River Railroad Company in that year and that company was in turn consolidated with others to form the New York Central in 1914 (R. 15). The Yonkers Branch is, because of its history, a component part of the New York Central.

2. The schedules of thirty Yonkers Branch trains are adjusted to the schedules of Hudson Division trains to provide a co-ordinated service (R. 188). The co-ordination is evidenced by the public timetables for the Yonkers

Branch (R. 332). This shows operation as a physical part of a steam railroad system of transportation.

3. About 600 passengers per day, aggregating 188,987 in a year; or 62.9 per cent of the total patronage of the line, require accommodations on Hudson Division trains as well as Yonkers Branch trains (R. 30). These passengers used Hudson Division trains to or from Grand Central Station. It would be most artificial to say that one portion of such a trip is not a part of the other or that the both operations are not a part of one system of transportation.

4. The through tickets sold between Grand Central Station and points on the Yonkers Branch not only provide for accommodations on the two divisions, but also carry optional privileges permitting use at certain Hudson, Harlem and Putnam main line stations (R. 224, 344). This feature permits passengers to use these other lines when Yonkers Branch service is not available or convenient, and clearly shows operation as part of one system.

5. The electric cars used on the Yonkers Branch are of the same type as those used on the Central's other suburban lines in the metropolitan area (R. 186). Abandonment of service on the electrically operated Yonkers Branch has resulted in the release of standard equipment formerly used on other suburban lines, and this standard equipment is now being used wherever needed on the New York Central System. Nothing could indicate more clearly that the Yonkers Branch is a part of a general steam railroad system than the fact that its abandonment has provided more coaches for the Central's steam trains operating as far west as St. Louis, Missouri. Soldiers of the United States may now be riding more comfortably because of the abandonment of the Yonkers Branch.

6. There is no separate work on the Yonkers Branch by train service employees (R. 204-5). They are all Putnam

Division men. The employee may be in Yonkers Branch service on one run and in Putnam main line steam service on the next run, all within one tour of duty (R. 245-6). Moreover, for a part of the distance Yonkers Branch trains are operated over the very same rails as are steam trains of the Putnam Division main line. The latter fact should establish beyond any possible dispute that the Yonkers Branch is a part of a general steam railway system of transportation. Such operation must be under co-ordinated regulations, signals and timetables. The trains go through or stop at the same common stations. In a case such as this where co-ordinated operations have been conducted by one company for fifty years, it is beyond all reason to entertain even the thought that the two operations are not a part of one system of transportation.

7. The Board of Directors of the company, in the resolution authorizing abandonment of the branch, described it as "that portion of the Putnam Division of the New York Central Railroad, known as the Yonkers Branch" (R. 13). The resolution further authorized certain named officers to institute proceedings before the Interstate Commerce Commission for a certificate that present and future public convenience and necessity permit of the abandonment, and upon receipt of such certificate "to abandon and remove said portion of the railroad known as the Yonkers Branch." This indicates that directors themselves recognize that the line was a part of the New York Central Railroad.

8. Finally, it should be noted that the \$56,941 per year loss, found by the Commission to be "a substantial loss to the applicant" (R. 78), is a charge upon the general revenues of the New York Central Railroad Company. It constitutes, as the Commission found, "an undue and unnecessary burden upon the applicant and upon interstate commerce."

POINT III

Appellants are in no position to complain about the lack of a finding as to whether the line is a suburban or interurban electric railway within the intendment of Section 1(22).

In view of the proof adduced at the hearing before the Interstate Commerce Commission concerning the history and operation of the Yonkers Branch, its long continued functioning, not as an independent electric railway but as a part of the New York Central, and particularly because of the lack of any doubt or question about it at the hearing, it is not surprising that the report of the Commission contains no discussion as to whether the branch is a suburban or interurban electric railway, and, if so, whether it is operated as a part of a general steam railroad system of transportation. There was, under the circumstances, no more reason to discuss such an issue than to discuss whether the line constituted a "spur, industrial, team, switching or side track" within the meaning of paragraph (22) of Section 1.

Though both appellants filed exceptions to the examiner's proposed report and briefs in support thereof, neither appellant requested a finding that the line was a suburban or interurban electric railway within the intendment of paragraph (22) of Section 1 as they now contend. The Commission's Rules of Practice require that each party specify the findings requested.* Such a request was not included in the nine requests for findings made by appellant Tooley (R. 56-7).

The report contains all the affirmative findings necessary to an exercise of jurisdiction in the premises. The

* Rule 91(e) of the Commission's Rules of Practice provides:

"(e) *Requested findings.* Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make."

lack of a negative finding as to what the line is not is in no way significant. It is not as if there was a failure to make a positive finding necessary to an exercise of jurisdiction, as in *Florida v. U. S.* 282 U. S. 194. If the appellants deemed the matter important, they should have put it in issue at the hearing. Moreover, had they put it in issue they would have had the burden of proving it and still have the burden, even at this point.

Paragraph (22) of Section 1 sets forth certain exceptions to the general coverage of paragraph (18). Paragraph (18) is remedial, containing as it does, the new legislative policy in the Transportation Act of 1920 in respect to the extension and abandonment of railroad mileage, in the interest of creating a national transportation system. It has been liberally construed, *Texas & Pacific R. Co. v. Gulf*, *Colorado & Santa Fe R. Co.*, 270 U. S. 266; *Colorado v. U. S.*, 271 U. S. 153. It follows that in order to effectuate the broad remedial purposes of the act the exceptions contained in paragraph (22) should be strictly construed.

It is well established that where an exception appears in a statute apart from its enacting clause, as is the case here, the party relying upon the statute need not allege or prove that his case does not come within the exception. The burden of alleging and proving that the case falls within the exception rests with the party claiming the advantage of it. 130 A. L. R. 440. More than 100 years ago Mr. Justice Story stated the rule as follows in *United States v. Dickson*, 40 U. S. 141:

“Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the Court below; we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and

objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof * * * (p. 165).

In *Spokane & Inland R. R. v. United States*, 241 U. S. 344, this Court refused to adopt a broad construction of the phrase "trains, cars and locomotives which are used upon street railways" forming an exception to the general coverage of the Safety Appliance Act, saying:

"* * * But we think the want of merit in the contentions is clear and the unsoundness of the argument advanced to sustain them apparent. We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment * * * (pp. 349-350).

Moreover, the phrase "not operate as a part or parts of a general steam railroad system of transportation", is a limitation upon the exception of "street, suburban and interurban electric railways". The limitation must also be construed with the remedial purpose of the statute in mind and not in such a manner as to broaden the scope of the exception beyond its plain intendment.

POINT IV

All other points raised by appellants have already been determined by this court in prior decisions.

1. *Whether continued operation of the line does impose an undue and unnecessary burden upon interstate commerce is not a matter for judicial redetermination.*

After full hearing and due consideration the Commission concluded that "Continued operation would impose an undue and unnecessary burden upon the applicant and upon interstate commerce" (R. 78). Whether such operation, entailing an annual loss of at least \$56,941, is a burden upon interstate commerce is not a matter for judicial redetermination. *Purcell v. U. S.*, 315 U. S. 381, 385. Nor is the fact that the railroad is generally prosperous at the particular time at all controlling. The lower court completely disposed of appellants' contentions in this regard by saying:

"Criticism of the conclusion that continued operation of the line was an undue burden on interstate commerce rests primarily upon the claimed present prosperity of the Central, concerning which the Commission made no specific findings. The Commission did, however, write a careful opinion in which it found a loss on the operation of this Branch in excess of \$56,000 a year and also set forth several alternative means of transportation—by bus, street railway, and ordinary railroad service—to the middle of New York City, and held that abandonment here was in the public interest. Under the circumstances the evidence before the Commission was adequate, and the Commission's conclusion well within its authority. Simply because the Central was generally prosperous does not mean that the Commission could not authorize the abandonment of a losing branch; otherwise a railroad would stand committed to drains upon its income for costly and unnecessary service until complete bankruptcy intervened. *Purcell v. United States*, D. C.

Md., 41 Supp. 309, 313, affirmed 315 U. S. 381, 62 S. Ct. 709, 86 L. Ed. 910; *Town of Inlet, N. Y. v. New York Cent. R. Co.*, D. C. N. D. N. Y., 7 F. Supp. 781; *Colorado v. United States*, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878; *Transit Commission v. United States*, 284 U. S. 360, 370, 52 S. Ct. 157, 76 L. Ed. 342" (R. 383).

2. *The case raises no new or novel issue respecting a conflict between state and federal authority.*

Whatever doubts there may have been at one time as to the proper spheres of state and federal authority in matters of this kind have been set at rest by this Court's decisions in *Colorado v. United States*, 271 U. S. 153, and *Transit Commission v. United States*, 284 U. S. 360.

The line involved in the *Colorado* case was a narrow gauge railroad physically detached from applicant's other lines, though used in connection therewith.—The Yonkers Branch is of standard railroad construction directly connected with other tracks of the New York Central and has coordinated service with other parts of the system. The line involved in the *Transit Commission* case was an electrically operated branch of the Long Island Rail Road comparable in many ways to the Yonkers Branch. Broad claims of unconstitutional invasion of sovereignty were dismissed as being without merit.

No claim is raised here that has not been already decided by this Court.

3. *No substantial claims of lack of due process or fair hearing are raised.*

The claim of lack of due process in respect to the hearing, or lack of rehearing, before the Interstate Commerce Commission so recklessly made by appellant Tooley (pp. 13-17) is without support in law or fact. It was fully dealt with by the court below as follows:

"Denial of a rehearing was clearly within the Commission's discretion, 49 U. S. C. A. § 17(6); the

claimed additional evidence was not of the kind to persuade to a different conclusion. The evidence was claimed to show that a New York subway would be extended to the terminus of the Yonkers Branch, that Yonkers and New York could or would reduce tax assessments, and that the present crisis in gasoline would reduce bus transportation. But the City of New York, which favored abandonment, showed that building of the subway extension was at best a matter for the quite indefinite future and there was no hope of tax abatement there; and if prospects of lessened taxes in Yonkers were brighter, at most the reduction would be less than \$9,000 per year. And there were alternative methods of transportation not dependent upon bus service. The suggestion that this loss may be used to reduce Central's excess profits tax suggests interesting possibilities for keeping declining roads alive; it may, however, be safely left with the Commission. The Commission had already allowed plaintiffs a full hearing, although not required by law to do so. *Woodruff v. United States*, D. C. Conn., 40 F. Supp. 949; 49 U. S. C. A. §§ 1(1)(a), 20a(6). * * * (R. 384).

POINT V

The judgment of the court below should be affirmed.

Respectfully submitted,

THOMAS P. HEALY,

HAROLD H. McLEAN,

Counsel for Appellee,

The New York Central Railroad Company.

Dated, December 1, 1943.

Appendix.

Pertinent paragraphs of Section 1 of the Interstate Commerce Act.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or

Appendix.

operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this

Appendix.

section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or inter-urban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

U. S.
1944
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President
of Committee of Yonkers Commuters, etc.,

Appellants,

THE UNITED STATES OF AMERICA, INTER-STATE COMMERCE
COMMISSION and THE NEW YORK CENTRAL RAILROAD
COMPANY.

MOTION TO ENLARGE TIME FOR ISSUANCE OF MANDATE.

THOMAS P. HEALY,
HAROLD H. McLEAN,
Attorneys for The New York
Central Railroad Company.

Supreme Court of the United States

OCTOBER TERM, 1943

No. 109

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President
of Committee of Yonkers Commuters, etc.,

Appellants,

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION and THE NEW YORK CENTRAL RAILROAD
COMPANY.

MOTION TO ENLARGE TIME FOR ISSUANCE OF MANDATE.

Now comes The New York Central Railroad Company, appellee in the above entitled cause, and respectfully moves that the time for the issuance of the mandate of the Court in this cause be enlarged until March 1, 1944, for the following reasons:

1. Your movant on August 20, 1942, filed its application with the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act seeking authority to abandon its Yonkers Branch (R. 10-30). After full hearing and argument Division 4 of the Commission issued its order certifying that the present and future public convenience and necessity permitted the abandonment (R. 78-79). This order, dated March 20, 1943, provided that it should become

effective within 40 days thereafter, or on April 29, 1943. The effective date of the order was subsequently postponed until May 29, 1943, pending consideration and ultimate denial by the full Commission of petitions for reconsideration (R. 110). Suit to enjoin the order was instituted on May 21, 1943 (R. 1). At the request of the District Court the effective date of the order was further postponed until June 12, 1943.

2. On June 10, 1943, the specially constituted District Court rendered its opinion and judgment finding the Commission's order to be valid (R. 380-5). The next day plaintiffs petitioned the District Court to stay the Commission's order pending appeal (R. 385-8). The District Court granted a temporary stay only until application could be made to this Court or a Justice thereof, but in no event longer than June 19, 1943 (R. 388). On June 16, 1943, application for a stay was presented to and denied by Mr. Justice Jackson after informal hearing, but Mr. Justice Jackson kept the application open until it could be considered by the Court. On June 21, 1943, the Court denied the stay and noted probable jurisdiction. The order of the Commission therefore became effective June 21, 1943.

3. Under the certificate of the Commission, found valid by the District Court and not stayed either by that court or by this Court, your movant, in order to avoid further losses from the operation of the branch and in order to utilize elsewhere on its system the equipment and manpower used in operating the branch, discontinued service over it on June 30, 1943. Since that time movant has removed some of the electric installations to avoid theft, while other facilities have deteriorated and the stations have been boarded up. The tracks remain intact. The employees used to maintain and operate said branch have been reassigned to other duties and the eleven multiple unit cars formerly used on the line have been placed in other service.

in the New York district, thereby bringing about the release of an equivalent number of standard coaches, formerly operating on movant's Harlem Division, for use elsewhere on movant's system where they were and are badly needed for the transportation of the large civil and military traffic resulting from the war.

4. On January 3, 1944, this Court rendered its opinion finding the Commission's order to be invalid solely on the ground of the inadequacy of the Commission's findings in respect of the status of the branch under Section 1(22) of the Interstate Commerce Act.

5. On January 12, 1944, the Commission on its own motion reopened the proceeding for rehearing and reconsideration, and assigned the proceeding for further hearing in the City of Yonkers on January 24, 1944, with leave to the parties to submit Briefs, provided they are filed on or before 10 days after conclusion of the hearing, with no reply briefs. Copy of the order is appended hereto as Exhibit A. It seems evident, in view of the early date assigned by the Commission for the rehearing and its announcement in respect to the filing of briefs, that the Commission contemplates rendering an early decision in the matter.

6. Under Rule 34 of this Court the mandate will issue as of course after the expiration of 25 days from the date the judgment was entered, or on January 28, 1944, unless the time is shortened or enlarged by order of the Court. If the mandate is issued on January 28, 1944, and the court below promptly issues its injunction setting aside the present certificate of the Commission, your movant will be compelled to restore service on the branch, with the probability that such restored service will be temporary only. Under these circumstances it is submitted that the present status should be maintained until the Commission has had an

opportunity to act. If the Commission finds upon the enlarged record containing up to date evidence that the abandonment would not be consistent with public convenience and necessity, service can then be restored on a permanent basis. A temporary restoration of service would not be in the public interest.

7. It is, therefore, in the public interest that the mandate of this Court be stayed until the Commission has had an opportunity to act, to the end that there shall be conserved the manpower and equipment that would be used by your movant in temporarily restoring service on the Yonkers Branch, since there exists on your movant's railroad, now largely engaged in war service, a severe shortage of both manpower and equipment, particularly standard coaches, as is more particularly set forth in the affidavit of Raymond D. Starbuck, Executive Vice President of your movant, hereto appended as Exhibit B.

WHEREFORE, The New York Central Railroad Company prays that the time for the issuance of the mandate of this Court be enlarged until March 1, 1944.

Respectfully submitted,

THE NEW YORK CENTRAL RAILROAD COMPANY,

By

THOMAS P. HEALY,
HAROLD H. McLEAN,
Its Attorneys.

Dated, January 18, 1944.

Exhibit A.**ORDER**

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 12th day of January, A. D., 1944.

Finance Docket No. 13914

NEW YORK CENTRAL RAILROAD COMPANY
ABANDONMENT

Upon further consideration of the record in the above-entitled proceeding, and

It appearing, That the Supreme Court of the United States on January 3, 1944, in its opinion in *City of Yonkers et al. v. United States of America et al.*, No. 109, October Term, 1943, held the certificate of public convenience and necessity issued herein on March 20, 1943, to be invalid because of the absence of requisite jurisdictional findings,

It is ordered, That, upon our own motion, said proceeding be, and it is hereby, reopened for rehearing, and reconsideration: ✓

It is further ordered, That said proceeding be, and it is hereby, assigned for further hearing before Examiner W. J. Schutrumpf on the 24th day of January, 1944, at 9:30 o'clock A. M., at City Hall, Yonkers, N. Y.:

And it is further ordered, That the parties may submit briefs provided they are filed on or before ten days after the conclusion of the hearing, but no reply briefs may be filed.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

Exhibit B.**AFFIDAVIT**

STATE OF NEW YORK }
 COUNTY OF NEW YORK } ss.:

RAYMOND D. STARBUCK, being duly sworn, deposes and says that he is Executive Vice President of The New York Central Railroad Company, and has supervision and jurisdiction over and is familiar with its passenger train and other operations and is informed as to its position in respect to manpower. Deponent further says that:

1. Due to the war emergency, the New York Central, though experiencing a rising tide of civil and military traffic, is, in common with other railroads, encountering a shortage of manpower, which, as of December 30, 1943, totaled 19,700 persons, divided as between 11,488 shortages in personnel and 8,212 absentees on account of illness. Shortages exist in all branches of the service, including the train and engine forces available for operating trains in the New York electric zone.

2. Due to the war emergency the New York Central, in common with other railroads, is encountering a shortage of equipment, particularly standard passenger coaches, which are in great demand for transporting civil and military traffic long distances in through movements over the Central and other railroads. The needs of the military for coaches for special movements vary between 50 and 250 per day, and when the demand is heavy coaches must be taken from regular trains and passengers on those trains deprived of seats. Many of the Central's passenger trains frequently carry standing passengers and occasional trains are so crowded that patrons are left on station platforms.

3. The restoration of service on the Yonkers Branch will take eleven multiple unit cars from the pool of cars already fully used to provide electric service in the New York suburban area. In order to replace these eleven multiple unit cars, an equivalent number of standard coaches will have to be withdrawn from the inter-city service and used, as they were before service was abandoned on the Yonkers Branch, on certain regularly scheduled and fully loaded trains operating on the Harlem Division in the New York suburban area.

4. Since the Yonkers Branch service is, to a considerable extent, a duplicate service for passengers now boarding trains at Ludlow station on the Hudson Division, and, as found by the Interstate Commerce Commission, there is suitable alternate service available in the City of Yonkers, it would, in affiant's judgment, in view of the circumstances above set forth, not be in the interest of efficient management and service to the largest number of people to restore service on the Yonkers Branch pending reconsideration by the Interstate Commerce Commission of the abandonment proceeding now before it.

RAYMOND D. STARBUCK.

Sworn to before me this
18th day of January, 1944.

G. HARRY OETGEN,

Notary Public, Westchester Co.

Certificate filed in New York Co.

N. Y. Co. Clk's. No. 266, Reg. No. 4-O-154

Commission Expires March 30, 1944.

1944 JAN 19 11 31 A.M.
CLERK
CHAS. ELMORE PROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 109.

CITY OF YONKERS and JOHN W. TOOLEY, Jr., as
President of Committee of Yonkers Commuters, etc.,

Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION and THE NEW YORK
CENTRAL RAILROAD COMPANY.

MOTION TO SHORTEN TIME FOR ISSUANCE OF MANDATE.

JOHN J. BRODERICK,

Corporation Counsel,

City of Yonkers,

Its Attorney.

Dated: January 19, 1944.

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 109.

CITY OF YONKERS and JOHN W. TOOLEY,
JR., as President of Committee of
Yonkers Commuters, etc.,

Appellants,

v.

THE UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION and
THE NEW YORK CENTRAL RAILROAD
COMPANY.

MOTION TO SHORTEN TIME FOR ISSUANCE OF MANDATE.

Now comes the City of Yonkers, appellant in the above entitled cause, and respectfully moves that the time for the issuance of the mandate of the Court in this case be shortened to January 25th, 1944, for the following reasons:

1. The defendant, New York Central Railroad Company, made an application on August 20th, 1942, under Section 1 (18) of the Interstate Commerce Act, to abandon its Yonkers Branch (R. 10-30). That Division 4 of the Commission issued its order dated March 20th, 1943, certifying that the present and future public convenience and necessity permitted said abandonment (R. 78-79). This Order dated March 20th, 1943, provided that the Order

become effective within forty (40) days thereafter, or on April 29th, 1943. The effective date of the Order was subsequently postponed until May 29th, 1943. This extension of the effective date of the Order was due to the fact that the appellants, City of Yonkers and John W. Tooley, Jr., as President of the Committee of Yonkers Commuters, etc., and the Public Service Commission of the State of New York, petitioned for reconsideration of the Commission's Order and for a rehearing. These petitions were denied (R. 110). An action was instituted by the appellants and the New York Public Service Commission to enjoin this Order (R. 1). While this action was pending, the effective date of the Order was further postponed until June 12th, 1943, at the request of the District Court.

2. As required by the statutes, a Statutory Court, consisting of three Judges, after hearing the case on the merits on June 10th, 1943, rendered its opinion and judgment adjudging the Commission's Order valid. (R. 385). After the rendition of this judgment the Public Service Commission of the State of New York decided to go no further and the Appellants, City of Yonkers and John W. Tooley, Jr., as President of the Committee of Yonkers Commuters, etc., decided to assume the burden of the appeal to the Federal Supreme Court. The Statutory Court of the District Court reconvened after the rendition of its judgment and upon motion of the Appellant, City of Yonkers, granted a temporary stay so that an application could be made to the Federal Supreme Court for a stay pending appeal to this Court. The stay by the Statutory District Court was until June 19th, 1943. (R. 388). The Appellants on June 16th, 1943, the Federal Supreme Court not then being in session, made an application for a stay to Mr. Justice Jackson. Mr. Justice Jackson held the application open

until it could be considered by the full Court. On June 21st, 1943, the full Court denied the stay; also denied the motion of the United States to affirm and noted probable jurisdiction. Purporting to act under the Order^o of the Interstate Commerce Commission, which was declared invalid by this Court, the Defendant, New York Central Railroad Company, discontinued service on June 30th, 1943, leaving the rails and other parts of the abandoned line intact.

3. Since June 30th, 1943, and up to the present time, namely January 19th, 1944, service on this line has been discontinued. This illegal abandonment and discontinuance of service means that for a period of approximately six and one-half months four stations along the abandoned line in the City of Yonkers have been closed, namely, Caryl, Lowerre, Park Hill and Getty Square. These stations have been closed since June 30th, 1943, and are still closed and discontinued in direct violation of Section 54 of the Railroad Law of the State of New York, as amended, (Chapter 49 of the New York Consolidated Laws). The closing of these stations has affected the orderly processes of life of a large proportion of the people of the City for they have depended for many years in a large measure on the railway service furnished by the railroad which the Defendant, New York Central Railroad Company, has abandoned under an invalid order. The Interstate Commerce Commission has this to say in its order for a rehearing dated January 12th, 1944:

"It appearing, That the Supreme Court of the United States on January 3, 1944, in its opinion in City of Yonkers et al., v. United States of America et al., No. 109, October Term, 1943, held the certificate of public convenience and necessity issued herein on March 20, 1943, to be invalid because of the absence of requisite jurisdictional findings,"

That the number of residents of the City of Yonkers which the City claims will be affected by this order is some 38,264. (R. 270-271). It also proved without contradiction at the previous hearings that the abandonment would cause a diminution of real property value of \$2,790,125. (R. 248.) At a hearing held in the early part of this month before the Public Service Commission of the State of New York in this matter, it was admitted by responsible officials of the New York Central Railroad Company, and it is in the record there, that the Defendant, New York Central Railroad Company, could resume service on its abandoned line within approximately a week after the issuance of a mandate out of this Court so that if the mandate did issue in due course on or about January 28th, 1944, service on the abandoned line could be restored within approximately one week according to the testimony of these New York Central Railroad officials. The number of cars which would have to be put in service on the abandoned line or the number of employees required to man the line was ruled out by the Hearing Commissioner as irrelevant. It is apparent that there is a division of opinion in the Federal Supreme Court as to whether this Yonkers Branch is an electric railroad within or without Section 1 (22) 49 U. S. C. for in the prevailing opinion, at the top of page 4, written by Mr. Justice Douglas, there is a statement:

"The Commission itself has noted that in the 'construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways.' Annual Report (1928), p. 80. That difficulty is apparent here by the division of opinion which exists in the Court whether this Yonkers branch is an 'interurban electric' railway which is 'operated as a part' of the New York Central system. Sec. 1 (22)."

The New York Central Railroad Company in its motion to enlarge, states at page 4 that "a temporary restoration of service would not be in the public interest". There is nothing to indicate that the restoration will be only temporary.

4. It is apparent that in the City of Yonkers, as in other communities, by reason of the Federal regulations in relation to the restriction of the use of rubber for tires and gasoline that the bus transportation system is acute and the busses are crowded. (See affidavit of Sheldon L. Pollock, Transportation Administrator for the City of Yonkers, N. Y., verified June 1, 1943 (R. 371-372). It is imperative that all transportation facilities be made available to the citizens of Yonkers at once. This is particularly true of the Yonkers Branch of the Defendant, New York Central Railroad Company, which has been abandoned since June 30th, 1943, which carried before the abandonment 600 passengers (each way) daily.

It is apparent from the foregoing that the City of Yonkers and its citizens have been deprived of service over the Yonkers Branch for a period of approximately six and one-half months under an invalid order without recourse, unless any damage suffered by this abandonment is actionable.

5. Rule 34 of this Court states that a mandate will issue as of course after the expiration of twenty-five days from the date the judgment was entered. That will be on or about January 28th, 1944, unless the time is shortened or enlarged by the Order of this Court. As stated above, the prevailing opinion indicates that there is a division of opinion as to whether the railroad in question here is an "interurban electric railroad", which is "operated as a

part" of the New York Central Railroad System. It may be that another invalid order may be issued by the Interstate Commerce Commission. In that event, the discontinuance of service might be for a longer period than six and one-half months under an invalid order as is the situation in this case or until the matter was adjudicated. The abandonment of this railroad is in absolute violation of Section 54 of the New York State Railroad Law, set out in Exhibit "A" appended herein.

6. It is, therefore, in the public interest that the mandate of this Court be shortened to January 25, 1944, and that the public interest involved as to the City of Yonkers and its inhabitants is more particularly set forth in the affidavit of William A. Walsh, City Manager of the City of Yonkers, in behalf of the said City of Yonkers, your movant herein, hereto appended as Exhibit "B".

WHEREFORE, the City of Yonkers prays that the time for the issuance of the mandate of this Court be shortened to January 25th, 1944, and the motion of the New York Central to enlarge be denied.

Respectfully submitted,

JOHN J. BRODERICK,
Corporation Counsel,
City of Yonkers,
Its Attorney.

Dated: January 19, 1944.

Exhibit A.

"Sec. 54. NOTICE OF STARTING TRAINS; NO PREFERENCES.
 "... No station established by any railroad corporation for the reception or delivery of passengers or property, or both, shall be discontinued without the consent of the commission having jurisdiction first had and obtained. * * *

(Section 54 of the Railroad Law as amended (Chapter 49 of the New York Consolidated Laws.))

Exhibit B.

STATE OF NEW YORK }
 COUNTY OF WESTCHESTER }

WILLIAM A. WALSH, being duly sworn, deposes and says:
 That he is the City Manager and Chief Executive of the City of Yonkers, New York.

Individually as a long time resident of the City of Yonkers and in his official capacity he is deeply interested and concerned with the general welfare of the City of Yonkers and its inhabitants.

That the present population of the City of Yonkers is approximately 142,000.

That for the past fifty-five years and up until June 30, 1943, a line of railroad, which is now electric, ran through the City of Yonkers from its southerly boundary to its northern termini at Getty Square, Yonkers, New York.

That on the said 30th day of June, 1943, this line was abandoned by the New York Central Railroad under color of an order issued by the Interstate Commerce Commission.

That along the line which was abandoned four stations were maintained by the New York Central Railroad Company:

That these stations were known and named as Caryl, Lowerre, Park Hill and Getty Square.

That the line carried over 600 passengers (each way) daily at the time that the New York Central Railroad Com-

pany made its application to the Interstate Commerce Commission for its certificate.

That the City of Yonkers claimed at the original hearing before the Examiner for the Interstate Commerce Commission that the population by the abandonment affected would be 38,204 in the year 1940.

That the number, therefore, affected, if the figure of 38,204 is accepted, would be over one-fourth of the entire population of the City of Yonkers.

That as developed at the hearing, without contradiction, the valuation of the property in the area affected would decrease approximately \$2,790,125.00.

That in addition to the discontinuance of this service for over 600 passengers (each way) daily and the diminution of real estate values in the City of Yonkers there is also this fact which must be taken into consideration, namely the over-crowding of all means of transportation especially street cars and busses in the City of Yonkers as evidenced by the affidavit of the War Transportation Administration of the City of Yonkers (R. 371-372).

That in the general public interest and in the interest of the City of Yonkers and its inhabitants every available means of transportation should be maintained in the City of Yonkers now and there should be no curtailment of service.

That it naturally follows that the 600 passengers who used the Yonkers branch prior to its abandonment now have to find other methods of transportation and all of these methods of transportation now used by them are over-crowded.

That in my opinion as City Manager and Chief Executive of the City of Yonkers the motion for the enlargement of the time for the issuance of the mandate herein should be denied and the motion of the City of Yonkers to shorten the time for the issuance of the mandate herein should be granted.

WILLIAM A. WALSH.

Sworn to before me this)
19 day of January, 1944.)

JAMES F. WHITE,

Notary Public—Westchester County.

FILE COPY

Office - Supreme Court, U. S.

FILED

FEB 29 1944

CHARLES CLARK CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 109.

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President
of Committee of Yonkers Commuters, etc., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION and THE NEW YORK CENTRAL RAILROAD
COMPANY.

**MOTION TO FURTHER ENLARGE TIME FOR
ISSUANCE OF MANDATE.**

THOMAS P. HEALY,

HAROLD H. McLEAN,

*Attorneys for The New York
Central Railroad Company.*

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 109.

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President
of Committee of Yonkers Commuters, etc., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION and THE NEW YORK CENTRAL RAILROAD
COMPANY.

MOTION TO FURTHER ENLARGE TIME FOR ISSUANCE OF MANDATE.

Now comes The New York Central Railroad Company, appellee in the above entitled cause, and respectfully moves that the time for the issuance of the mandate be further enlarged from March 1 until March 30, 1944, for the following reasons:

1. In our motion of January 18, 1944, praying that the Court enlarge the time for the issuance of mandate until March 1, 1944, it was pointed out that shortly after the rendition of this Court's opinion on January 3, 1944, the Interstate Commerce Commission, on its own motion, reopened the proceeding for rehearing and reconsideration and assigned the proceeding for further hearing on Janu-

ary 24, 1944; that it seemed evident that the Commission contemplated an early decision following rehearing; that if the mandate of this Court were issued 25 days after its judgment, or on January 28, 1944, and the court below should promptly issue its injunction setting aside the certificate of the Commission, your movant would be compelled to restore service on the branch, with the probability that such restored service would be temporary only; that under these circumstances the present status should be maintained until the Commission had an opportunity to act; that if the Commission should find upon the enlarged record containing up-to-date evidence that the abandonment would not be consistent with the public convenience and necessity, service could then be restored on a permanent basis; that a temporary restoration would not be in the public interest.

2. By order dated January 31, 1944, this Court granted said motion, and enlarged the time for the issuance of the mandate until March 1, 1944.

3. Rehearing was held by the Interstate Commerce Commission on January 24 and 25, 1944, and within ten days thereafter briefs were submitted by the parties.

4. On February 25, 1944, the Commission issued its report on rehearing and reconsideration and found, upon the enlarged record then before it, that the Yonkers branch is not an interurban electric railway within the contemplation of paragraph (22) of section 1 of the Interstate Commerce Act but is an electrically operated branch of the New York Central Railroad, and is operated as a part of its general steam system, and that it is, therefore, subject to the authority of the Commission under paragraphs (18) to (20) of section 1. The Commission made other jurisdictional findings. It further found, after full consideration of detailed evidence bearing on the needs of the public, that present and future public convenience and necessity permit abandonment of the branch. The Commission issued with

its report a certificate that the present and future public convenience and necessity permit the abandonment of the branch. A certified copy of the report and certificate is attached hereto as Exhibit A.

5. The certificate provides that it shall take effect and be in force from and after 30 days from February 28, 1944, or on March 30, 1944. Because the certificate will not take effect except after 30 days' notice, or on March 30, 1944, it is apparent that if the mandate of this Court be issued on March 1st and the court below makes its injunction effective promptly, a temporary restoration of service on the branch will be necessary. Your movant is still confronted with a severe man-power shortage and a shortage of passenger coaches needed for the long-distance transportation of civilian and military passengers. In view of these circumstances and of the findings in the Commission's report on rehearing and reconsideration, it is submitted that a short temporary restoration of service on the Yonkers branch would not be in the public interest.

WHEREFORE, the New York Central Railroad Company prays that the time for issuance of the mandate of this Court be further enlarged from March 1 until March 30, 1944.

Respectfully submitted,

THE NEW YORK CENTRAL RAILROAD COMPANY,

By THOMAS P. HEALY,

HAROLD H. McLEAN,

Its Attorneys.

Dated, February 29, 1944.

EXHIBIT A.**INTERSTATE COMMERCE COMMISSION****WASHINGTON**

I, W. P. BARTEL, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Notice of the Commission dated February 28, 1944;
and

Report and certificate of the Commission filed and entered February 25, 1944,

in Finance Docket No. 13914, New York Central Railroad Company Abandonment, the originals of which are now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 28th day of February, A. D. 1944.

W. P. BARTEL,
*Secretary of the Interstate
Commerce Commission.*

(SEAL)

INTERSTATE COMMERCE COMMISSION

February 28, 1944.

NOTICE

Finance Docket No. 13914

NEW YORK CENTRAL RAILROAD COMPANY ABANDONMENT

The decision of the Commission, dated February 25, 1944, in the above-entitled proceeding, will be printed in full in the permanent series of Interstate Commerce Commission reports.

Accordingly, the note at the top of page 1 of said decision should be disregarded.

W. P. BARTEL,
Secretary.

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13914.

NEW YORK CENTRAL RAILROAD COMPANY ABANDONMENT.

Submitted February 4, 1944. Decided February 25, 1944.

Certificate issued permitting abandonment by the New York Central Railroad Company of a branch line of railroad in Bronx and Westchester counties, N. Y.
Previous report, I. C. C.

Harold H. McLean, for applicant.

Francis J. Bloustein for the City of New York, N. Y.

Philip Halpern and *Lawrence J. Olmstead* for Public Service Commission of the State of New York.

John J. Broderick for City of Yonkers, N. Y.

Horace M. Gray for Committee of Yonkers Commuters.

J. G. Luhrsen, *Willard H. McEwen*, *M. M. Moran*, *Charles Serhey*, *F. J. McGuire*, and *W. O. Cooney* for employees.

REPORT OF THE COMMISSION ON REHEARING AND RECONSIDERATION BY THE COMMISSION:

The New York Central Railroad Company, hereinafter called applicant, on August 20, 1942, applied for a certificate under section 1(18)-(20) of the Interstate Commerce Act authorizing it to abandon its Yonkers branch extending from Van Cortlandt Park Junction, New York, N. Y., to Getty Square, Yonkers, N. Y., 3.1 miles.

Hearing was held November 12, 1942, at which the Public Service Commission of New York, the City of Yonkers and a committee of Yonkers commuters appeared as protestants. The City of New York appeared in support of the application. An examiner's proposed report was served, to

which protestants filed exceptions, followed by oral argument before Division 4.

On March 20, 1943, Division 4 issued a report finding that public convenience and necessity permitted the abandonment, and, with the report, issued an appropriate certificate.

Petitions for rehearing were filed by protestants, in which, for the first time, they contended that the branch is an electric interurban railroad not operated as a part of a general steam railroad system of transportation, and that under section 1(22) we are without authority to permit the abandonment. By order of May 10, 1943, we denied the petitions.

A suit was filed to set aside the certificate. The District Court sustained the validity of the certificate and denied the relief sought. 50 F. Sup. 497. On June 30, 1943, applicant discontinued all train service on the branch but has kept the rails and other appurtenances intact. Upon appeal, the Supreme Court held that the certificate should have been set aside because of the absence of requisite jurisdictional findings, and reversed the judgment. *City of Yonkers v. United States*, U. S. , decided January 3, 1944.

By order of January 12, 1944, we reopened the proceeding upon our own motion for rehearing and reconsideration. Further hearing was held January 24, 1944, and substantial additional evidence was presented. Briefs were submitted within the ten-day period specified in our order.

STATUS OF YONKERS BRANCH.

Protestants contend that the application should be dismissed for lack of jurisdiction on the ground that the branch is an electric interurban railway within the exemption of section 1(22). They introduced no evidence in support of this contention. Applicant submitted additional evidence directed to a showing that the branch is not an interurban electric railway and that it is operated as a part of applicant's system. Section 1(22) provides:

The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or in-

terurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

It will be noted that this paragraph does not exempt all street, suburban or interurban electric railways, but only those which are not operated as a part or parts of a general steam railroad system of transportation. By these provisions, as we interpret them, Congress did not intend to exempt from the construction, extension, and abandonment provisions of section 1 any part of the system of a general steam railroad subject to the Act. Congress knew that many parts of steam railroads were then operated electrically and that there was a prospect of further electrification of such railroads. It intended to exercise control over all parts of such lines, whether operated by steam or by electric power.

An electric railway, not operated as a part of a general steam railroad system, engaged in transportation between urban communities, and therefore literally an "interurban electric railway," may or may not be exempt under paragraph 22 depending upon many factors, chiefly whether its operations are similar to those performed by commercial steam railroads. Several of such railways have been found to be exempt under paragraph 22. Cf. *Proposed Abandonment by Lewiston & Youngstown Frontier Ry. Co.*, 124 I. C. C. 219. Other such railways have been found not to be exempt. See *Construction by Piedmont & Northern Ry.*, 138 I. C. C. 363, in which our findings were sustained by the Supreme Court in *Piedmont & N. Ry. v. Interstate Commerce Commission*, 286 U. S. 299. As pointed out in our annual report for 1928, p. 80, great difficulty has been experienced in the construction of the exclusion clauses of the Act, including that in section 1(22), particularly in determining the roads properly classifiable as interurban-electric railways. If, however, as in the present case, it is claimed that the track involved, though electrically operated, is a branch line of a railroad operated for the most part by steam, and is operated as a part of a general steam system, we are relieved of the necessity of determining whether the branch, if it were operated independently of a steam system, would be properly classifiable as an interurban electric, and need only determine whether it is operated as a part of a general steam system.

Applicant is a common carrier by railroad engaged in the transportation of passengers and property in interstate and foreign commerce, and also in intrastate commerce. Its lines extend from New York, N. Y., and Boston, Mass., to Chicago, Ill., and numerous other points in 11 States and 2 provinces in Canada. It is subject to the Interstate Commerce Act, part I.

Its entire system, comprising 16,187 miles of main track and 8,187 miles of other track, is operated by steam, except in two locations, Cleveland, Ohio, and New York and vicinity, where some of its operations are conducted by electric power. It operates 3,198 steam locomotives and 146 electric locomotives.

Applicant's Hudson Division, which extends from New York to Albany and is part of the main line to Chicago, is electrically operated between Grand Central Station and Harmon, N. Y., 33 miles. Through express trains, as well as local commutation trains to and from points north of Harmon, change to electric power at Harmon. The Hudson Division begins at Grand Central Station, on East 42nd Street, runs north to Mott Haven Junction at East 149th Street, then northwestwardly to a point near Sedgwick Avenue and West 161st Street, thence northerly on the east bank of the Harlem River to West 191st Street, there turns west to the Hudson and proceeds northerly on the east bank of the Hudson, through Yonkers.

East of the Hudson Division, and roughly parallel with it, is a second line of applicant, called the Harlem Division, extending from Mott Haven Junction to Chatham, N. Y., where it connects with applicant's main line from Boston to Albany. This division, which skirts the city limits of Yonkers on the east, is electrified, and is exclusively operated by electric power between Grand Central and North White Plains, 24 miles.

A third division of applicant, the Putnam, lying between and roughly paralleling the Hudson and Harlem divisions, extends northerly from Sedgwick Avenue station, at Sedgwick Avenue and West 161st Street, New York City, to a point of connection with the Harlem Division at Putnam Junction, near Brewster, N. Y. This division is equipped for electric operation between Sedgwick Avenue and Van Cortlandt Park Junction, 4.7 miles, but the only trains using these electric installations were those operating between Sedgwick Avenue and Yonkers branch points. Putnam Di-

vision main line trains operate by steam locomotives south of Van Cortlandt Park Junction as well as north thereof, using the same tracks as the electric trains south of the junction. The Yonkers branch was operated by electric power exclusively.

It is clear that although its lines are electrically operated in some localities, applicant is "a general steam railroad system of transportation" within the meaning of section 1(22).

The original evidence, as supplemented upon rehearing, shows clearly that the Yonkers branch is operated as a part of applicant's system. The branch is a part, and is operated as a part, of the Putnam Division. The tracks of the Putnam Division from Sedgwick Avenue to 191st Street, about $2\frac{1}{2}$ miles, are immediately adjacent to those of the Hudson Division, and at two points connect therewith. Three stations along this stretch, High Bridge, at 169th Street, Morris Heights, at 177th Street, and University Heights, at 207th Street, are common to and serve both the Hudson and Putnam divisions. While at 191st Street the Hudson Division turns west, the Putnam proceeds northerly, passing through Van Cortlandt Park (a large public park of the City of New York extending from 240th Street to the northern city limits, about 2 miles). It then enters and passes through the city of Yonkers, thence northerly to Putnam Junction. In Yonkers the Putnam and Hudson divisions are only about a mile apart and less than 2 miles there separate the Putnam and Harlem divisions.

The Yonkers branch joins the main line of the Putnam Division at a point in Van Cortlandt Park opposite West 250th Street, called, for convenience, Van Cortlandt Park Junction. The branch proceeds from this junction in a northwestwardly direction for 1.4 miles in Van Cortlandt Park to the city limits, thence for 1.7 miles through the southern portion of the city of Yonkers to Getty Square station, where it comes to a dead end. At Getty Square the branch is 0.3 mile from the Hudson Division and about 0.7 mile from the Putnam Division main line. The Branch does not connect with the line of any railroad other than applicant's, nor does it connect elsewhere than at Van Cortlandt Park Junction with any other line of applicant.

No freight traffic has been handled over the branch for many years; no industries are dependent on it for such service. Nor does it handle mail, express or milk traffic. Its

traffic is exclusively passenger, principally commuter travel to Grand Central Station.

For many years prior to 1926, the Yonkers branch was operated by steam. On the latter date it was electrified, the third rail system being installed, and, at the same time, the Putnam Division below Van Cortlandt Park Junction was similarly equipped, permitting operation of electric trains between Getty Square and Sedgwick Avenue.

Train service on the branch prior to its discontinuance on June 30, 1943, consisted of 34 trains (17 each way) daily, with no service on Sundays, consisting of from two to four multiple-unit cars. These trains operated between Getty Square and Sedgwick Avenue, about 8 miles, running on the Yonkers branch north of Van Cortlandt Park Junction and on the Putnam main line south thereof. This was the only train service on the branch. There was no strictly local train service between stations on the branch itself. Most of these trains stopped at all intermediate stations, namely, Park Hill, Lowerre, Caryl, Van Cortlandt (in Van Cortlandt Park opposite West 242nd Street, about $\frac{1}{4}$ mile south of Van Cortlandt Park Junction), Kings Bridge (230th Street), University Heights (207th Street), Morris Heights (177th Street), and High Bridge (169th Street).

Due to the congested condition of the main line south of Mott Haven, and other operating difficulties, Putnam Division trains do not run through to Grand Central Station, but terminate at Sedgwick Avenue. Putnam Division and Yonkers branch passengers going to Grand Central must transfer to Hudson Division trains at either High Bridge or University Heights. The train schedules of the Hudson Division and those governing the Getty Square-Sedgwick Avenue trains and Putnam Division main line trains are arranged so that close connections may be made at the transfer points.

There are no separate operations conducted exclusively on the branch. The only trains operated on the branch were also operated over another part of applicant's system—the Putnam Division south of Van Cortlandt Park Junction. A majority of the passengers riding on Yonkers branch trains begin or end their trips at Grand Central Station, transferring to or from Hudson Division trains. Through tickets for such trips are issued by applicant, at rates named in its published tariffs. Time tables of trains operating on the branch are published by applicant, and

these tables show also the schedules of connecting Hudson Division trains at High Bridge and University Heights operating to and from Grand Central. All revenues accruing from the operation of the branch are collected by applicant; all expenses of its operation are paid by applicant.

The track now known as applicant's Yonkers branch, constructed by an independent company in 1888 and operated by that company and the New York & Putnam Railroad Company for several years, was leased to applicant's predecessor, the New York Central & Hudson River Railroad Company, on February 1, 1894. The latter company conducted steam operations over the branch as a part of its general system until April 29, 1914, when that company was merged with applicant. On March 7, 1913, the New York & Putnam was merged with applicant's predecessor, and thereafter ceased to have separate corporate identity. The branch has been operated by applicant since April 29, 1914, as a part of its Putnam Division which, in turn, is operated as a part of its railroad system.

All trainmen operating Yonkers branch trains, all agents at stations on the branch and all other employees connected with the operation of the branch are employees of applicant. The branch has no separate supervising officers such as superintendents, train-masters, or the like. The superintendent in charge of operations on applicant's "electric division" in the New York District has authority over the Grand Central Terminal, that part of the Hudson Division which is electrified, that part of the Harlem Division which is electrified, that part of the Putnam Division which is electrified, and the Yonkers branch.

The tracks of the Yonkers branch are maintained under the general supervision of applicant's maintenance-of-way engineer having authority over applicant's lines at Buffalo and east thereof, and under the immediate supervision of a division engineer charged with the maintenance of certain other lines in the New York district.

No separate accounts are maintained for the branch. The station agents at points on the branch make reports to the system auditor of passengers accounts in the same manner as station agents at other points on the system, and the expenses are reported through divisional offices to the departmental accountants who in turn report them to the applicant's auditor of disbursements at New York. To determine the results of operation of the branch, a separation

must necessarily be made of general system accounts. No separate reports are made to this Commission or to the New York Commission respecting the branch. The results of operation of the branch are included in the figures for the system as a whole in the reports to this Commission. The annual report of applicant to this Commission for the year 1942 and for many previous years shows the branch as a part of the system owned and operated by applicant.

In view of these facts, and many other supporting facts of record, we find that the Yonkers branch is not a street, suburban or interurban electric railway within the contemplation of section 1(22), but is an electrically operated branch of a general steam railroad system, and that, even though there were doubt concerning its status as an electric railway, it would yet not be within the exemption of section 1(22), since it is operated as a part of applicant's general steam railroad system of transportation. Compare *Proposed Control of Sacramento Northern by W. P. R. R.*, 71 I. C. C. 653 and 79 I. C. C. 782, *New York, Westchester & Boston Ry. Co.*, 218 I. C. C. 253, and *Interurban Electric Railway Company*, 227 I. C. C. 589; see also *Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. We further find that the application for a certificate authorizing abandonment of this branch is subject to our authority under paragraphs (18) to (20), inclusive, of section 1 of the act, and that the branch is not within the exemptions of paragraph (22).

PUBLIC CONVENIENCE AND NECESSITY.

The portion of the branch in New York City is entirely within Van Cortlandt Park, which has no resident population. The branch serves a relatively small residential area in the southern part of Yonkers. The only stations on the branch are Caryl, Lowerre, Park Hill, and Getty Square in Yonkers. There is no station at Van Cortlandt Park Junction, nor elsewhere on the branch in Van Cortlandt Park.

Patronage on the Yonkers branch declined steadily during the last 15 years of its operation. As found in the earlier report, the volume of business in 1941 and early in 1942 was only about 25 per cent of that 12 years previously. In 1926, when the branch was electrified, 71 trains were operated on week days. Because of the gradual reduction of the number of passengers using the branch, train operations were progressively reduced between 1926 and Septem-

ber 1938 to 36 trains, and then a reduction was made to 34 trains, 17 northbound and 17 southbound.

Actual train checks made in May 1941, May 1942, June 1942, and October 1942, showed that the total number of passengers carried on Yonkers branch trains averaged 643 southbound and 593 northbound. Nearly two-thirds of these used commutation tickets: 453 southbound, 433 northbound. Most of these passengers commuted between Caryl or Lowerre and Grand Central. The monthly commutation fare between these stations, about 14 miles, is \$8.53.¹ It is obvious that this small number of passengers paying these fares would not produce sufficient revenue to support the branch. The total system revenues received from the transportation of all passengers traveling locally on the branch and between points on the branch and Grand Central and other points on applicant's system, for example, \$47,610 in 1942, was only slightly more than the taxes assessed against the branch, for example, \$34,557, paid in 1942.

The original report showed the aggregate number of passengers carried on the branch during 1940 and 1941 and the first six months of 1942. Upon rehearing similar data were furnished for the year 1942 and the six months of operation in 1943. This evidence indicates that there was no increase in patronage on the branch subsequent to the period covered by the original record, but that on the contrary there was a slight decrease. This is shown by comparing the number carried during the six months of operation in 1943 with the corresponding period of the preceding year. In the six months of 1943 the number was 160,306, or 1,295 less than the 161,601 carried during the similar period of 1942. The revenue was about the same, \$24,494 in the first six months of 1942 and \$24,545, or \$51 more, in the corresponding period of 1943. The number carried during

¹ Other fares are as follows: Between Grand Central and Caryl, one-way fare 28 cents, round trip 56 cents, 12-trip fare \$3, 26-trip fare \$6.10. Between Grand Central and Lowerre, 33 cents, 66 cents, \$3.15 and \$6.10, respectively. Between Grand Central and Park Hill, 33 cents, 66 cents, \$3.40 and \$6.60, respectively; monthly commutation fare \$8.94. Between Grand Central and Getty Square, 33 cents, 66 cents, \$3.60 and \$7.05, respectively; monthly commutation fare \$9.29. In addition, 46-trip monthly school fares are maintained between these points, as follows: between Grand Central and Caryl, \$6.15, Lowerre, \$6.15, Park Hill, \$6.47, Getty Square, \$6.74.

the year 1942 was 314,502 (averaging about 502 daily in each direction). In 1940, 335,909 were carried, in 1941, 300,205. The figure for 1942 reflects a slight increase over 1941, but a marked decline from 1940.

Of the 314,502 carried in 1942, 6,674 were local passenger between stations on the branch; the others were "interline" passengers, going to other points on applicant's system, including 196,042 who traveled between stations on the branch and High Bridge or University Heights and there transferred to or from Hudson Division trains en route to or from Grand Central.

The earlier report, after setting forth the supporting figures, found that "the estimated annual loss from operation of the branch is \$56,941, on the basis of the average revenues for the years 1940 and 1941, including rents and the small amounts of income from vending machines." Evidence submitted at the rehearing, giving corresponding figures for the year 1942 and the first six months of 1943, shows that the estimated annual loss from operation of the branch, on the basis of the average revenues for 1940, 1941, 1942, and the first six months of 1943, is \$60,155, or \$3,214 more than previously found. The difference between the two figures is attributable, in the computation of the later one, to the use of 1942 costs for labor, and to the use of the 51½ years prior to July 1, 1943, in computing maintenance of way and structure expenses instead of on the 7¼-year period from 1933 to 1937, 1940, and 1941, and the first three months of 1942, used in the earlier computation.

In determining the financial results of the operation of the branch, the branch was credited with all the revenues earned on the hauling of passengers locally between points on the branch and also with the entire revenues earned on the hauling of passengers between each of the stations on the branch and Grand Central Station and all other points of destination. The revenues were ascertained from ticket sales and conductors' cash sales, plus a proper proportion of revenue from sales of "optional" tickets purchased at points not on the branch, under which, generally speaking, the purchasers may elect to travel on either the Hudson Division or the Yonkers branch or the Putnam main line to and from points on those lines for distances approximately equal to the distances north of the Grand Central Terminal as far as Getty Square. The total revenues were: Local, including negligible amounts from vend-

ing machines, \$715 in 1940, \$720 in 1941, \$701 in 1942 and \$532 in 1943 (six months); from passengers traveling to and from points beyond the branch, \$48,888 in 1940, \$44,717 in 1941, \$46,936 in 1942, and \$24,022 in 1943 (six months), totaling \$49,603, \$45,437, \$47,637, and \$24,554, respectively—an average of \$47,780 annually for the 3½-year period, to which average should be added, in order to determine the total system revenue accruing from the operation of the branch, \$2,100 annual rentals received from leases of space, making an aggregate of \$49,880. No other revenue attributable to the operation of the branch was received.

Expenses assigned to the performance of this transportation are estimated at \$110,035 annually. There are included in these expenses only the following item: Out-of-pocket expense of operating the branch, \$44,957; taxes assessed on the right-of-way and other properties of the branch by the cities of New York and Yonkers, based on the 1944 rates and assessed valuations, \$21,510 in Yonkers and \$11,526 in New York City, totaling \$33,036, minus \$676 paid by lessees, or \$32,360; out-of-pocket expense of transporting the passengers on the Putnam Division south of Van Cortlandt Park Junction, \$32,718; total, \$110,035. In computing these costs nothing was included for overhead expense, or depreciation. The difference between these expenses and the total revenue of \$49,880 represents the annual loss of \$60,155 from the operation of the branch.

The out-of-pocket expense of \$44,957 incurred in operating the branch is the total of the following items: Maintenance of way and structures, based on actual expenditures during the 5½-year period prior to July 1, 1943, \$17,908; maintenance of equipment, i.e., repairs to multiple unit cars, based on cost per car mile, \$2,924; crew wages, based on a mileage proportion, or 40 per cent of the wages paid for train operation between Sedgwick Avenue and Getty Square, \$8,682; train supplies and expenses, based on cost per car mile, \$2,010; station employees, actual, \$9,309; station expenses, actual, \$430; power expense, based on cost per car mile, \$3,694. Generally the expenses are based on 1942 costs, except, as above indicated, those relating to maintenance of way and structures.

The \$32,718 shown as the cost of transporting branch passengers in electric operations on the Putnam main line south of Van Cortlandt Park Junction is divided as follows: Maintenance of way \$6,751; maintenance of equip-

ment, \$4,387; crew wages, \$13,023; train supplies and expenses, \$3,016; power expense, \$5,541. In computing these costs no consideration was given to expenses for steam operations on this part of the Putnam Division which have been maintained since the discontinuance of electric operations between Getty Square and Sedgwick Avenue and which will continue in the future.

No expense is included in the above computations for transporting in Hudson Division trains between High Bridge or University Heights and Grand Central, 8 miles and 9.5 miles, respectively, the Yonkers branch passengers who transferred at High Bridge or University Heights to or from Yonkers branch trains. This expense was omitted on the theory that the full cost of operating Hudson Division trains would continue even though they carried no Yonkers branch passengers. But it is obvious that space had to be provided on those trains for the Yonkers branch passengers, and that duplicate service was provided for all Yonkers branch passengers who transferred to or from Hudson Division trains, averaging 62 or 63 per cent of the total Yonkers branch passengers. In other words, northbound, space had to be provided for these passengers in Hudson Division trains from Grand Central to High Bridge or University Heights. These trains continued on to Harmon or Peekskill, at no less expense than if these passengers had continued on. Service also had to be provided for them in Yonkers branch trains from High Bridge or University Heights to stations on the branch in Yonkers. Similarly, southbound, space had to be provided in Hudson Division trains, which started at Peekskill or Harmon, for the Yonkers branch passengers carried on Yonkers branch trains to High Bridge or University Heights and there transferring to Hudson Division trains.

On the foregoing bases, the operation of the branch resulted in system losses of \$60,155 annually. These losses would be saved by abandonment of the branch. Applicant has added, as additional savings, \$14,991, representing interest at 5 per cent annually on the net salvage value of the branch and equipment of \$299,823. If this interest is added to the loss of \$60,155, it would increase the estimated saving from the abandonment of the branch to \$75,146.

A study was made by the applicant to ascertain how many of the former Yonkers branch patrons continued to use applicant's lines and how much revenue was obtained

from their transportation, after discontinuance of the operation of the branch. The study was confined to ticket sales for rides between the Hudson Division Ludlow station and the Grand Central Terminal. In the first six months of 1943, Ludlow passengers increased \$1,442 over the same six months in 1942, and revenues increased \$1,471 a month. In the five months, July to November, 1943, after discontinuance of service on the branch, Ludlow passengers increased 83,777 over the same five months of 1942, and revenues increased \$3,353 monthly. The difference between the monthly increases in the five-month period and the increases in the previous six-month period of 1943 indicates the portion of the Ludlow business after June 30, 1943, attributable to the use of the Hudson Division by former patrons of the Yonkers branch, namely, 9,848 passengers and \$1,882 revenue monthly, or at the rate of 118,176 passengers a year and \$22,584 annual revenue. The suggestion is advanced by the applicant that the \$22,584 should be added to the actual annual losses incurred from the operation of the Yonkers branch to show the effect of the abandonment on its system. If this is done, the savings from the abandonment of the branch, including interest on net salvage value, are increased to \$97,730.

It is clear that on either of the bases submitted by the applicant, or any other fair method of computation, the operation of the branch has resulted in substantial losses, varying from \$57,000 to \$60,000 annually. While it is true that interest on salvage value and the retained revenue resulting from use by former branch patrons of the Hudson Division are further benefits which will accrue to applicant if the branch is abandoned, and show the additional burden upon applicant and upon interstate commerce if the operation of the branch is continued, we are of the opinion that such items cannot be considered as losses incurred in such operation. The fact, however, that there was a substantial increase in the number of passengers to and from Ludlow is relevant on the question of public convenience and necessity, as it indicates the availability of other adequate transportation facilities.

The Committee of Yonkers Commuters contends, in effect, that the actual loss of \$60,155 from the operation of the branch should be reduced to \$36,093 because if the loss had not been incurred applicant would have paid a 40 per cent Federal income tax on an equal sum, amounting to

\$24,062. But obviously the loss was actually incurred, and it cannot reasonably be considered that it was less because applicant's total income tax might have been \$24,062 less than it would have been had it not been incurred.

The Committee suggests we should require applicant to take steps to secure substantial reductions in taxes paid to New York City and the City of Yonkers, in the interest of honest, efficient and economical management. Negotiations with the taxing authorities of those cities since our first hearing resulted in a reduction of \$2,407 in Yonkers taxes, and none in the New York City taxes. There is nothing in the record to indicate that applicant could reasonably hope to force their reduction.

Applicant assumes that the area tributary to the branch is bounded on the west by a line midway between the branch and the Hudson Division and on the east by a line midway between the branch and the Putnam main line, and that, therefore, the branch serves an area of approximately 1.2 square miles, or 5.7 per cent of the total area of Yonkers, and estimates that the population served by the branch is 12,834. The Deputy Tax Commissioner of Yonkers expressed the view that the area tributary to the branch is more extensive, that it includes three wards having a total population of 38,204 in 1940. Assuming the latter figure to be right, it indicates there are a substantial number of people living in the area tributary to the branch. Yet the record shows that only a handful of them patronized the branch.

The Deputy Tax Commissioner further testified that the assessed value of the land and improvements in the area considered by him to be tributary to the branch was \$27,901,250; and a real estate broker expressed the opinion that this value would be decreased approximately 10 per cent by the abandonment of the branch. In view of the small number of Yonkers residents who used the branch, it seems unreasonable to suppose that the value of the tributary real estate would be reduced 10 per cent by the abandonment. However, as we have held in numerous cases, residents and property owners who do not furnish sufficient traffic to support a line cannot reasonably expect it to be continued in operation indefinitely at a substantial loss to the carrier, in order to preserve the value of their property.

Abandonment of the branch will not leave the City of Yonkers without adequate alternate transportation. There are a number of other routes which furnish practically the same transportation service as the branch. The Hudson and Putnam divisions afford frequent commutation service to the vicinity of Sedgwick Avenue and to Grand Central Station. There are four stations in Yonkers on the Hudson Division, Greystone, Glenwood, Yonkers, and Ludlow, at which numerous trains stop throughout the day, and furnish rapid transportation to and from Grand Central, without change of cars en-route, and make stops at intermediate points, including Marble Hill (West 225th Street), University Heights, Morris Heights, High Bridge, 138th Street, and 125th Street. Ludlow is the nearest and the most convenient Hudson Division station in Yonkers for persons living near the Yonkers branch. Ludlow is 0.6 mile from the Park Hill station, 1.1 miles from the Lowerre station and 1.6 miles from the Caryl station. Two bus lines, referred to more in detail later, operate from the vicinity of the Yonkers branch to Ludlow. Thirty-eight trains daily furnish passenger service between Ludlow and Grand Central.²

There are six stations on the Putnam Division within Yonkers: Nepera Park, Gray Oaks, Nepperhan, Bryn Mawr, Dunwoodie, and Lincoln. Ten trains, stopping at all these stations, and an eleventh stopping at Bryn Mawr and Dunwoodie, operate southbound on week days, to Sedgwick Avenue, scheduled to make close connections at High Bridge or University Heights with Hudson Division trains bound for Grand Central. Northbound, 13 trains operate on week days from Sedgwick Avenue, making close connections with Hudson Division trains from Grand Central, and all stop at the six stations in Yonkers. Most of these trains run during the morning and afternoon rush hours. Lincoln, the most convenient for persons living near the Yonkers branch, is 0.6 mile from Caryl, 0.9 mile from Lowerre, and 1.6 miles from Park Hill. A street car line from Getty

² Service on these trains is very frequent in the morning and afternoon rush hours. For example, trains leave Ludlow for Grand Central Station in the early morning hours at 6:21, 7:07, 7:31, 7:47, 7:57, 8:02, 8:14, 8:34, 8:50, and 9:13. Northbound trains stopping at Ludlow leave Grand Central Station at 4:17, 4:34, 5:17, 5:18, 5:19, 5:35, 5:36, 5:52, 5:54, 6:07, 6:15, 6:26, 6:40, and 7:13.

Square, Yonkers, passing close to Park Hill, Lowerre, and Caryl, runs east on McLean Avenue to the Lincoln station.

Two bus lines operate from the area adjacent to the Yonkers branch to Ludlow. One of these, the Nodine Hill, operates from the Hudson Division Yonkers station to Ludlow, over a route that passes Getty Square station, proceeds about 1.5 miles to the east, then south about an equal distance, then west on Caryl Avenue, crossing Broadway, to Ludlow, passing immediately in front of the Yonkers branch Caryl station. The other, the Park Hill, operates between the same termini over a route somewhat shorter, proceeding east past the Getty Square station to Linden Avenue, then south, then west on Radford Street, crossing Broadway, to Ludlow, passing within half a block of the Lowerre station. Most of the Yonkers branch patrons used the Caryl and Lowerre stations.

Frequent service is maintained over these routes; and the busses are scheduled to arrive at Ludlow shortly before the departures of Hudson Division trains and to leave there shortly after arrivals of the trains. On the Nodine Hill, 16 bus trips are made in the morning rush hours, with a bus arriving at Ludlow every few minutes between 6:30 and 9:32 a. m., and during the afternoon rush hours 13 trips are made from Ludlow between 4:45 and 7:09. On the Park Hill, there are 12 trips to Ludlow in the morning rush hours and 19 from that station in the afternoon rush hours.

The monthly commutation fare between Grand Central and Ludlow, 14 miles, is \$8.94, equivalent to 17 cents per ride on basis of 52 rides monthly. The bus fare is 5 cents, making the total bus-train fare 22 cents. The monthly commutation fare between either Caryl or Lowerre and Grand Central of \$8.53 is equivalent to 16.4 cents per trip on basis of 52 trips monthly, or 5.6 cents per trip cheaper than the route by bus and Ludlow Hudson Division trains. The time required for travel between Lowerre or Caryl and Grand Central, including the transfer to the Hudson Division, averaged about 40 minutes, which was only a few minutes less than the route by bus to Ludlow and the Hudson Division train.

The Park Hill line started operations in December 1937. About half of its patrons live in the area adjacent to the Yonkers branch. The Nodine Hill line was started in 1940 and was extended to Caryl Avenue in 1941. Upon the inauguration of these bus lines many passengers then patron-

izing the Yonkers branch deserted that route and began using the busses to and from Ludlow and the Hudson Division trains.

There has been no change in the routes of the Park Hill and Nodine Hill lines since the previous hearing. During the interim a "tripper" bus was added to the Nodine Hill line, making two trips during the morning rush hours to Ludlow and two trips from Ludlow during the afternoon rush hours to and from a point near the Lowerre station. A new school bus route was also established in the interim. This bus operates during the morning hours in the same vicinity as the other bus routes, taking school children off the regular routes and permitting more passengers to board the busses to and from Ludlow. Protestants claim that since the discontinuance of the Yonkers branch trains these busses have been overcrowded. This is denied by the bus company. On the whole, the bus service seems to be adequate.

Other alternative routes are provided by street cars from Yonkers to the New York subway system. Two lines of the New York subway system reach almost to the city limits of Yonkers. The Broadway subway extends to 242nd Street, within about 1.5 miles of the Yonkers city limits. The Lexington Avenue subway extends to Woodlawn, about 1.3 miles from the Yonkers city line. The Broadway subway runs southward on Broadway and Seventh Avenue to the tip of Manhattan, thence to Brooklyn. The Lexington Avenue subway runs down on the east side on Jerome and Lexington Avenues to the Battery and Brooklyn. Two street car lines from the northern part of Yonkers converge at Getty Square, and run south on Broadway to 242nd Street and beyond. Broadway in Yonkers is between applicant's Yonkers branch and its Hudson Division, closely paralleling the Yonkers branch throughout its length. During the morning and afternoon rush hours, these two car lines together maintain a 2½-minute headway. The running time from Lawrence Street and Broadway, in Yonkers, which is near Lowerre station, to 242nd Street is only 10 minutes. The previous record showed that substantially more passengers could be carried on these car lines without difficulty. The superintendent of the company expressed the view that in the event of the abandonment of the Yonkers branch, his company would be able to handle the expected increase in business. Upon rehearing, he testi-

fied there had been no change in the schedule of these cars; that their volume of business increased during the period of about a year prior to December 1, 1943, and then declined. He had no way of determining how much of the increase was attributable to the discontinuance of service on the Yonkers branch.

The McLean Avenue street car line, previously referred to as running from Getty Square and passing close to the Park Hill, Lowerre, and Caryl stations to the Lincoln station, proceeds easterly from that station for a short distance to Jerome Avenue, then south to the Lexington Avenue Woodlawn subway station.

Other alternative routes are (1) Broadway surface car and subway from Yonkers to Marble Hill station at Broadway and 225th Street, thence Hudson Division train to Grand Central, with an over-all time of 50 minutes and an aggregate fare of 24 cents; (2) Broadway surface car through to Marble Hill, thence Hudson Division train to Grand Central, this latter route being 5 cents cheaper than the former as it does not use the subway; (3) by either the Nodine Hill or Park Hill bus to Caryl Avenue or Radford Street and Broadway, thence Broadway street car line to 242nd Street, thence the Broadway subway.

The time required for these trolley-subway trips is somewhat longer than that on applicant's Yonkers branch-Hudson division trains to Grand Central, but the fare, 5 cents on the trolley and 5 cents on the subway, is much cheaper.

The record indicates that these are all practicable and feasible routes, and that they have been used frequently by Yonkers' residents. At the original hearing a number of Yonkers commuters, testifying in opposition to the proposed abandonment, compared the Yonkers branch route with various alternative routes, and stated, in most instances, that the former was more convenient for them. But in each instance it was developed that there existed one or more alternate routes which could be used. The routes employing surface cars and subways were all much cheaper, but usually the time was somewhat longer; those embracing other lines of applicant were usually about the same from the time standpoint but were somewhat more expensive. As stated in the report of division 4, in most instances, the alternate routes required from 10 to 25 minutes more time. The maximum claimed was 55 minutes.

one witness testifying that he used the Yonkers branch from Caryl to go to his place of business on Madison Avenue near 43rd Street, transferring at High Bridge to a Grand Central train, and that he made this trip in 35 minutes; that he had tried the trip northbound by subway and surface car, without specifying which ones, and that the difference in running time was 55 minutes. This testimony assumes a time of $1\frac{1}{2}$ hours to go by subway and surface car from 42nd Street in New York City to Caryl Avenue in Yonkers, whereas the subway running time from Times Square, at 42nd Street, to 242nd Street is about 37 minutes and of the Broadway trolley from 242nd Street to Caryl Avenue, about 10 minutes. A review of the record shows that the statement in the report of division 4 that the excess time, depending upon the method of travel used, was in some instances an hour or more is erroneous.

Upon rehearing it was shown that the 11 multiple unit cars used in service between Sedgwick Avenue and the Yonkers branch prior to its discontinuance were added to the pool of such cars in service in the New York district and that this permitted the release of standard steam train coaches, then employed on the electrified portion of the Harlem Division, for use elsewhere on the system where they were needed for civilian and military long-distance travel.

The Commuters Committee contends that the loss suffered by the applicant from the operation of the Yonkers branch is small when compared with the system profits, and therefore cannot be considered an undue burden on the applicant or on interstate commerce. In the period 1933-1942 the applicant's net railway operating income ranged from \$33,269,163 in 1933 to \$15,582,476 in 1938, and thereafter increased progressively to \$90,399,495 in 1942 and in the first 11 months of 1943 amounted to \$80,439,361. Its net income in these years, after payment of fixed charges ranging from \$58,369,186 in 1933 to \$48,513,499 in 1942, and \$41,712,778 in the first 11 months of 1943, were \$5,412,514, deficit, in 1933; \$7,682,335, deficit, in 1934; \$115,046 in 1935; \$8,933,175 in 1936; \$6,352,612 in 1937; \$20,154,357, deficit, in 1938; \$4,509,236 in 1939; \$11,265,084 in 1940; \$26,245,562 in 1941; \$49,082,182 in 1942; \$54,574,182 in the first 11 months of 1943.

It was shown by the City of Yonkers that the applicant's total investment, including investment in road and equip-

ment, improvements on leased property, and other investments, as of December 31, 1941, was \$1,734,816,620; that the rate of return upon that investment, after payment of all expenses and Federal and Canadian taxes, for the calendar year 1941, was about 31.3 per cent, and that the rate of return in the year 1942, on the same basis, was about 5.06 per cent. The rate of return for the 11 months of 1943, similarly computed, based on a total investment of \$1,762,964,927 and a net railway operating income of \$80,439,361 was 4.56 per cent, or at the rate of about 4.97 per cent for the year. If applicant's income is now flush, it is attributable largely to the transportation of an enormous tonnage of war materials and of a swollen passenger traffic incident to travel by rail because of war conditions. These are abnormal conditions; they cannot be expected to continue indefinitely in the future. Applicant's revenues are earned from rates and fares the general level of which is presumably reasonable, and if that general level, or if particular rates, are unreasonable, they are subject to reduction by procedure under the Interstate Commerce Act. The National Transportation Policy requires that transportation subject to the provisions of the Act shall be so regulated, as, among other things, "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation" and "to encourage the establishment and maintenance of reasonable charges for transportation services . . ." It is contrary to the purposes of the abandonment provisions and inconsistent with the purpose of the act as a whole to require drains upon the revenue of an interstate carrier flowing from the operation of an unprofitable and unnecessary branch merely because system operations as a whole are profitable. Losses from such operation are inevitably a burden on interstate commerce, whether at the particular time the system as a whole is profitable or unprofitable.

In *Long Island R. Co. Abandonment*, 166 I. C. C. 671, authorizing the Long Island to abandon a portion of its Whitestone branch, where we discussed this question, we said, at pp. 676-677:

. . . Our jurisdiction was practically conceded by the representative of the civic associations, who, however, suggested that even though we consider that we have jurisdiction it should not be asserted in this instance, for the reasons that the questions involved are almost

wholly of a local character and that such losses as may occur through operation of the branch by the applicant can not possibly be considered as placing an unreasonable burden upon inter-state commerce. The evidence is to the effect that the applicant is a prosperous carrier and that it is in turn controlled by the Pennsylvania Railroad Company, which is well known to be among the strongest railroad systems of the country . . . It is true that even though we add to the applicant's transportation losses from operation of the branch the capital charge that would be imposed upon it by the proposed grade-crossing elimination, the amount involved is relatively small when compared with the financial resources and transactions of the Pennsylvania system. Nevertheless it must be recognized that the conservation of the resources of any railroad system requires cognizance of items even less substantial than those here involved. Any unnecessary burden upon the transportation system of the country is an unreasonable burden. While it is true that loss from operation of a portion of a railroad system will not in every case justify the abandonment of such operation, it is also true that circumstances may justify the abandonment of an unprofitable line notwithstanding the prosperity of the system as a whole. The circumstances of each case must govern its disposition. . . . This view, and our proposed action, are, in our opinion, fully supported by the views of the Supreme Court regarding the purposes of the statute under which we take jurisdiction, as expressed in *Colorado v. United States*, 274 U. S. 153, . . .

Our order in that proceeding was sustained by the Supreme Court in *Transit Commission v. United States*, 284 U. S. 360. See also *Oregon-W. R. & Nav. Co. Abandonment*, 175 I. C. C. 492, 494-495; *Chicago, M., St. P. & P. R. Co. Proposed Abandonment*, 162 I. C. C. 89; *Abandonment of Line by Colorado & Southern Ry.*, 72 I. C. C. 315, 320, in which our order was sustained by the Supreme Court in *Colorado v. United States*, 274 U. S. 153.

We find that the continued operation of the Yonkers branch will impose an unnecessary and undue burden upon the applicant and upon interstate commerce.

The Public Service Commission of New York and other protestants assert that we lack jurisdiction on the ground that the branch lies wholly within the State, and there is no affirmative showing that interstate commerce is transported over it, that its traffic is exclusively passenger, mostly commuter travel to Grand Central Station, and that the continued operation of the branch or its abandonment is wholly a matter of local interest.

The record is not altogether clear on the question whether the branch has transported interstate passengers. It does indicate that passengers travelling on interstate journeys may have used the branch. The stations on the branch were supplied with tickets in the same form as used at all other stations on applicant's system which could be issued for use to any point on the system, either for intrastate or interstate journeys. Tickets could be purchased at any station on the system for travel either intrastate or interstate to points on the Yonkers branch. The tariffs of applicant, published and filed with this Commission, named fares from points on the branch to other points on the system, including fares for interstate journeys to and from points in other States. While there is no evidence that passengers have purchased tickets at Yonkers branch stations for interstate journeys and have used them on Yonkers branch trains, it seems probable that many passengers, in making journeys to and from points in other States, especially those south of New York, have ridden on Yonkers branch trains at the beginning or end of their trips, transferring in New York City to and from stations of other railroads. A passenger from Yonkers to Washington, D. C., for example, could travel from Yonkers to New York City either wholly on the Hudson Division or on the Yonkers branch and then the Hudson Division, and transfer from the Grand Central Station in New York City to either the Pennsylvania or the Baltimore & Ohio Railroad.

Under the decision in *Colorado v. United States*, 271 U. S. 153, however, the leading authority in cases of this nature, we have jurisdiction to authorize abandonment, as to intrastate commerce, of an intrastate branch of a common carrier by railroad engaged also in interstate transportation subject to the provisions of the Interstate Commerce Act, where its system physically extends from one State to another, if the branch is operated at a substantial loss and its abandonment is, therefore, necessary in order to re-

move a burden on interstate commerce, and if public convenience and necessity permit of its abandonment. The fact that the continued operation of the branch in intrastate commerce would burden interstate commerce is controlling on the question of jurisdiction, and it would seem clearly to be without significance that the burden is caused by the operation of the branch exclusively for a particular kind of traffic. Compare *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204; *Abandonment by Detroit & Mackinac Ry.*, 138 I. C. C. 576, 579-580; *U. S. Feldspar Corp. v. United States*, 38 F. 2d 91 (D. C. N. D. N. Y.); *Transit Commission v. United States*, 284 U. S. 360, 368. This is recognized by the decision of the Supreme Court in the present case, which states:

The power of the Commission to control the abandonment of intrastate branches of interstate carriers stems from the power of Congress to protect interstate commerce from undue burdens or discriminations. *Colorado v. United States*, 271 U. S. 153; *Transit Commission v. United States*, 284 U. S. 360; *Parcell v. United States*, 315 U. S. 381.

The fact that the Yonkers branch has only passenger business, mostly local commuter traffic, is not of legal significance on this question of jurisdiction, for the applicable principle would not be different if the branch, instead, transported only freight traffic.

At the original hearing a witness for applicant testified to the following effect: Early in 1942 the War Production Board made an urgent demand upon applicant and other railroads to do everything possible to find places where facilities might be abandoned so as to produce scrap metal and second hand rail. The Government has been very deficient in second-hand rail for the purpose of meeting the requirements of cantonments, defense industries, storage yards and the like. Applicant made a canvas and found 15 or 20 locations where the possibility was presented, and then investigated those places to determine whether or not abandonment should be effected. The Board urged that prompt action should be taken in respect to these abandonments and expedited as much as possible with this Commission, but it did not suggest any particular abandonment. From the negotiations and discussions between the Board and officials of the applicant, it appears that the Board is

of the opinion that this particular abandonment should be carried out, that is to say, that it "should be presented to the Interstate Commerce Commission."

Counsel for the Commuters Committee contends that the presence of this testimony in the record disqualifies us to act, on the ground it indicates pressure upon us by a war agency. In this connection the same counsel refers to our annual report to Congress for 1942, in which we said, in part:

Owing to the present national demand for metals and rails which can be salvaged from abandoned railroads, carriers have been making surveys of their branch-line operations for the purpose of determining whether they are warranted in requesting permission to abandon any of them.

.

Under our cooperative plan with the War Department and the War Production Board, we notify them of applications for permission to abandon as these are filed and advise them of the status thereof. The War Department, in each case, notifies us whether it considers the line involved of military value. The War Production Board forwards to us, as information, notices of requisitions of lines of railroad, the materials in which it considers suitable for salvage purposes.

When an application is filed, even in times of war or national peril, our duty is to determine, from the evidence presented, whether "the present or future public convenience and necessity permit of such abandonment." The need of the military authorities for scrap metal and relaying rail, however urgent or vital to the winning of the war, would not alone warrant a finding that public convenience and necessity permitted a particular abandonment. It might be an element which may, and perhaps should, be considered by us, see *Confluence & O. R. Co. Abandonment*, 247 I. C. C. 399, 401, the order in which was sustained in *Purcell v. United States*, 315 U. S. 384; *Gulf, T. & W. Ry. Co. Abandonment*, 233 I. C. C. 321, 331; *Southern Pac. Co. Abandonment*, 199 I. C. C. 731, 735; *Great Northern Ry. Co. Construction*, 166 I. C. C. 3, 37; *Clarkson Character of Commerce v. Nor. Pac. Ry. Co.*, 160 I. C. C. 752, 759. But we need not give this element any weight here, for this record fully

warrants a certificate of abandonment, without consideration of it.

Upon rehearing evidence regarding the possible extension of the Lenox Avenue subway in New York City was submitted. An engineer of the New York Board of Transportation testified to the following effect: The Board has formulated a project to extend the subway from its present terminus at West 145th Street north to West 155th Street and 8th Avenue. If constructed, this extension would enable passengers to transfer to the present elevated railway which extends from West 155th Street and 8th Avenue eastward to a point on River Street near East 164th Street, where passengers may make connection with the Lexington Avenue subway. Shuttle service is now provided on this elevated line, and one of its stations is at Sedgwick Avenue.³ This project has not, however, progressed beyond the blueprint stage. It is merely one of numerous projects that have been studied by the Board; it has not been adopted, and it is not known whether it will be. Hundreds of such projects have been studied and then shelved.

It seems obvious that the possibility of this extension has so remote a relation to the proposed abandonment of the Yonkers branch that it is entitled to practically no weight. The record shows that there was a steady decline in Yonkers branch patronage for many years prior to the dismantlement of the 6th Avenue and 9th Avenue elevated lines, and that though the retained shuttle enabled Yonkers branch passengers to effect connections with the 8th Avenue subway, the Yonkers branch patronage continued to fall off. These facts indicate that even though the Lenox Avenue extension were built, it would not have the effect of substantially increasing Yonkers branch patronage.

If its application is granted, applicant would dismantle and salvage the Yonkers branch, and it would also dismantle and salvage the electric installations on the Putnam

³ Prior to the dismantlement of the 6th Avenue and 9th Avenue elevated lines in December 1938 and June 1940, respectively, passengers from applicant's Putnam Division and Yonkers branch trains running to Sedgwick Avenue could transfer to the elevated system at Sedgwick Avenue to continue their journeys to downtown New York. When those elevated railways were dismantled, the present shuttle was retained, permitting applicant's passengers to use the shuttle from Sedgwick Avenue to West 155th Street and 8th Avenue and there transfer to the subway.

main line south of Van Cortlandt Park Junction. The Putnam main line would not be otherwise disturbed, and the present steam operations on that division to and from Sedgwick Avenue, including the local or commutation service between Sedgwick Avenue and the several stations on the Putnam Division in Yonkers, would be continued. The application does not seek authority for the removal of the electric installations on the Putnam Division south of Van Cortlandt Park Junction or for the discontinuance over this track of the electric train operations en route to and from the Yonkers branch. No authority from us to make these changes is necessary. The mere removal of the electric installations would not constitute an abandonment of the line. Nor would the partial discontinuance of service over this part of the Putnam Division constitute an abandonment within the meaning of section 1(18) of the act; see *Palmer v. Massachusetts*, 308 U. S. 79, 85; *Public Convenience Application of Kansas City Southern Ry.*, 94 I. C. C. 691; *Morris & Essex R. Co. Proposed Abandonment*, 175 I. C. C. 49, 52. However, in reaching our conclusions herein, we have given consideration to the fact that upon abandonment of the Yonkers branch the applicant would discontinue the train service between Sedgwick Avenue and Getty Square.

A certificate authorizing the proposed abandonment would include by necessary implication the authority to discontinue all service on the branch and dismantle the rails and other facilities. The jurisdiction over abandonments conferred upon us by section 1(18) of the act is exclusive, in view of the provision of section 1(20) that the carrier may, from and after the issuance of our certificate, proceed with the abandonment covered thereby, without securing approval other than such certificate. It follows that our jurisdiction is not affected by reason of the fact that applicant has not secured the consent of the State Commission to discontinue service over the branch or to discontinue the stations on it.

The people of Yonkers virtually deserted this branch, and the applicant ought not to be required to maintain it, at a continuing loss of approximately \$60,000 annually, for the few people who found it somewhat more convenient than available alternate means of transportation. The rehearing discloses nothing to indicate that any substantial increase in business on the Yonkers branch will be experienced in

the future, and we affirm the finding of division 4 in this regard.

We find that present and future public convenience and necessity permit abandonment by the New York Central Railroad Company of the branch of railroad in Bronx and Westchester counties, New York, described herein.

EMPLOYEES.

No employee has been forced out of employment on the applicant's system as a result of the cessation of operation of the branch. Prior thereto four station agents, two enginemen, two conductors and one brakeman (or collector) worked on the branch exclusively, from six to ten engine and train crew employees on the Putnam Division main line worked part time on the branch, and a section crew, consisting of one foreman and usually six men worked on the branch and the portion of the Putnam Division south of Van Cortlandt Park Junction. Our certificate will be issued upon the understanding that we retain jurisdiction for a period of two years from the date hereof to consider the question of imposing conditions for the protection of employees who may have been adversely affected by anything done pursuant to the permission herein granted.

The findings in the report of division 4, except as modified herein, are affirmed.

An appropriate certificate will be issued.

COMMISSIONER ALLEDGE, being necessarily absent, did not participate in the consideration and adoption of this report.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 25th day of February, A. D. 1944.

FINANCE, DOCKET No. 13944

NEW YORK CENTRAL RAILROAD COMPANY ABANDONMENT

Investigation of the matters and things involved in this proceeding having been made, and hearing and rehearing having been held, and a report containing our findings of fact and conclusions thereon having on the date hereof been made and filed, which report is hereby referred to and made a part hereof:

It is certified, That the present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of a branch line of railroad in Bronx and Westchester counties, New York, described in the aforesaid report, *provided, however*, and this certificate is issued upon the express understanding, that the Interstate Commerce Commission reserves jurisdiction for a period of two years from the date hereof to consider the question whether conditions should be imposed for the protection of employees who may have been adversely affected by anything done pursuant to the permission to abandon granted herein.

It is ordered, That this certificate shall take effect and be in force from and after 30 days from February 28, 1944.

And it is further ordered, That The New York Central Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission.

(SEAL)

W. P. BARTEL,
Secretary.

SUPREME COURT OF THE UNITED STATES.

No. 109 — OCTOBER TERM, 1943.

City of Yonkers and John W. Tooley,
Jr., as President of Committee of
Yonkers Commuters, Etc., Appel-
lants,

vs.

The United States of America, Inter-
state Commerce Commission and the
New York Central Railroad Com-
pany.

Appeal from the District
Court of the United
States for the Southern
District of New York.

[January 3, 1944.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The Interstate Commerce Act confers upon the Interstate Commerce Commission authority to issue certificates of public convenience and necessity allowing any carrier subject to the Act to abandon "all or any portion" of its line of railroad. Sec. 1(18), (19), (20), 49 U. S. C. § 1(18), (19), (20), 24 Stat. 379, 41 Stat. 477-478. But the Act also provides that that authority of the Commission "shall not extend" to the abandonment "of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam-railroad system of transportation." Sec. 1(22), 49 U. S. C. § 1(22).

The New York Central Railroad Co. filed an application with the Commission for a certificate under § 1(18)-(20) of the Act authorizing it to abandon an electric branch line extending 3.1 miles from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, New York. This line was constructed in 1888 by a predecessor company for the purpose of developing suburban business between Yonkers and New York City. The line was electrified in 1926 with the hope that the suburban business would increase. It is now a physical part of the New York Central's Putnam Division with which it connects at Van Cortlandt Park Junction. The Putnam Division in turn connects with the Hudson Division which is part of the main line of the New York Cen-

tral from New York City to Chicago. The Hudson Division follows the east bank of the Hudson River through Yonkers to Albany. The Putnam Division extends north from Sedgwick Avenue and West 161st Street, New York City, through Yonkers to Brewster, New York. The Putnam Division lies east of, and is roughly parallel with, the Hudson Division. In the City of Yonkers the two divisions are about a mile apart. The electric line in question is between the Hudson and Putnam Divisions. Getty Square, a terminal in Yonkers, is a mile east of the Yonkers station on the Hudson Division. The New York Central system is for the most part operated by steam. Some portions of its lines are electrified, including the Hudson Division between New York City and Harmon, New York, and Harlem Division so far as White Plains, New York, the Putnam Division between Sedgwick Avenue and Van Cortlandt Park Junction, and the Yonkers line in question. With the exception noted, no part of the Putnam Division is electrified, its trains being operated by steam.

This Yonkers electric branch handles no freight, mail, express, or milk traffic and no industries are dependent on it for such service. Its traffic is exclusively passenger traffic, principally commuter travel between Getty Square and three other stations in Yonkers and Grand Central Station in New York City. The trains serving stations on this Yonkers electric branch do not go through to Grand Central Station on account of the congested condition of the main-line tracks funneling into Grand Central Station. Accordingly, these trains run only from Getty Square to Van Cortlandt Park Junction and thence over the main-line of the Putnam Division to the terminal at Sedgwick Avenue. Passengers from Yonkers to Grand Central Station must transfer to Hudson Division trains at either High Bridge or University Heights stations which are north of the Sedgwick Avenue Station. Tariffs of the New York Central provide for one-way, monthly, commutation, and other tickets usable between the stations in Yonkers and Grand Central Station. Time tables of the New York Central disclose the service on this electric branch. And its operating results are reflected in the accounts of the New York Central.

The trains running on this electric branch are composed of two, three or four cars. The trains are hauled not by a locomotive but by so-called multiple unit cars. The structure of the line is such

that locomotives cannot be used on it. The trains on this electric branch proceed only to Getty Square, Yonkers, and not beyond.

The Commission though adverting to a number of the facts which we have mentioned did not address itself to the question whether this electric branch line was or was not "operated as a part or parts of a general steam railroad system of transportation" within the meaning of § 1, 22. The Commission did not undertake to review the evidence relevant to that issue. It made no findings respecting it. It authorized the abandonment on the grounds that continued operation would impose "an undue and unnecessary burden" upon the New York Central and upon interstate commerce.¹ The Commission says that the question of its jurisdiction under § 1, 22, was neither presented *in limine*, nor urged in the briefs, in the exceptions to the examiner's report, or in the oral arguments. It was, however, presented in petitions for reconsideration which the Commission denied without opinion.

This suit to enjoin the order of the Commission, brought before a District Court of three judges (38 Stat. 219, 220, 28 U. S. C. § 47) was initiated by the Public Service Commission of New York, the City of Yonkers, and a committee of Yonkers commuters.² The jurisdiction of the Commission was challenged before the District Court. And that objection which was overruled there (50 F. Supp. 497) has been renewed on the appeal, which brings the case here. 28 U. S. C. § 47a, § 345.

The District Court in sustaining the order of the Commission, reviewed the evidence and concluded that the operation of this electric branch was "intertwined with the operation of the system as a whole." It relied especially on the fact that the bulk of the traffic on this electric branch transfers at High Bridge or University Heights to the Hudson Division and that those transfers made it necessary for the New York Central to provide seats on the Hudson Division trains for all the transferred Yonkers passengers for the remaining short run to Grand Central Station.

¹ The certificate authorizes a complete abandonment of the Yonkers branch, including dismantlement and salvaging.

² The Public Service Commission of New York, which took the lead in attacking the order of the Commission before the District Court but which has not appeared here, asserted in its complaint that authority to discontinue the four stations was required by New York law but had not been sought or obtained.

The Commission itself has noted that in the "construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways." Annual Report (1928), p. 80. That difficulty is apparent here by the division of opinion which exists in the Court whether this Yonkers branch is an "interurban electric" railway which is "operated as a part" of the New York Central system.³ § 1(22). As stated by Mr. Justice Brandeis in *United States v. Idaho*, 298 U. S. 105, 109, the determination of what is included within the exemption of § 1(22) involves a "mixed question of fact and law." Congress has not left that question exclusively to administrative determination; it has given the courts the final say. *Id.*, p. 109. It is settled that the aid of the Commission need not be sought before the jurisdiction of a court is invoked to enjoin violations of the provisions in question. *Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266. And the fact that the Commission fails to make a finding on this jurisdictional question obviously does not preclude the reviewing court from making that determination initially. But we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission.

The power of the Commission to control the abandonment of intrastate branches of interstate carriers stems from the power of Congress to protect interstate commerce from undue burdens or discriminations. *Colorado v. United States*, 271 U. S. 153; *Transit Commission v. United States*, 284 U. S. 360; *Parell v. United States*, 315 U. S. 381. And see *United States v. Hubbard*, 266 U. S. 474, for an application of the doctrine of the *Shreveport* case (*Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342) to the intrastate rates of interurban electric railroads. The exemptions contained in § 1(22) do not necessarily reflect the lack of constitutional power to deal with the excepted phases of railroad enterprise. Underlying § 1(22) is a Congressional policy of reserving exclusively to the states control over that group of

³ Cf. *Piedmont & N. R. Co. v. Interstate Commerce Commission*, 286 U. S. 299, 307, and *United States v. Chicago, N. S. & M. R. Co.*, 288 U. S. 1, 9-12, which emphasize in determining the status of independent electric roads the dominance of interurban passenger service and the preponderance of local traffic.

essentially local activities. See H. Rep. No. 456, 66th Cong., 1st Sess., p. 18. We recently stated that the extension of federal control into these traditional local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions." *Palmer v. Massachusetts*, 308 U. S. 79, 84. In the application of the doctrine of the *Shreveport* case, this Court has required the Commission to show meticulous respect for the interests of the States. It has insisted on a "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida v. United States*, 282 U. S. 194, 211-212. ~~that~~ *In* that case this Court set aside an intrastate rate order of the Commission because of the "lack of the basic or essential findings required to support the Commission's order." *Id.*, p. 215. The principle of the *Florida* case is applicable here. The question is not merely one of elaborating the grounds of decision and bringing into focus what is vague and obscure. See *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499. Cf. *Securities & Exchange Commission v. Chenery Corp.*, 318 U. S. 80. Here as in the *Florida* case the problem is whether the courts should supply the requisite jurisdictional findings which the Commission did not make and to which it even failed to make any reference.⁴

Congress has withheld from the Commission any power to authorize abandonment of certain types of railroad lines. It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission⁵ has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards

⁴ For cases dealing with the exception of suburban or interurban electric railways where the Commission has passed on the jurisdictional question see In the Matter of Michigan United Rys. Co., 67 I. C. C. 452; Abandonment of Line by Boise Valley Traction Co., 79 I. C. C. 167; Proposed Abandonment by Lewiston & Youngstown Frontier Ry. Co., 124 I. C. C. 219; Construction by Piedmont & Northern Ry. Co., 138 I. C. C. 363, 372; Unified Operation at Los Angeles Harbor, 150 I. C. C. 649, 661; Glendale & Montrose Ry. Proposed Abandonment, 166 I. C. C. 625.

⁵ The requisite finding was made by the Commission in the Oregon Short Line case (193 I. C. C. 697, 705) in which the order of the Commission was set aside by *United States v. Idaho*, *supra*.

the appropriate line between the federal and state domains. Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears. The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect (*Illinois Commerce Commission v. Thomson*, 318 U. S. 675), as by improper findings. The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.

We are asked to presume that the Commission, knowing the limit of its authority, considered this jurisdictional question and decided to act because of its conviction that this branch line was not exempt by reason of § 1(22). But that is to deal too cavalierly with the Congressional mandate and with the local interests which are pressing for recognition. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.

This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.

We intimate no opinion on the merits of the controversy. In absence of the requisite jurisdictional findings we think the order of the Commission should have been set aside.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 109.—OCTOBER TERM, 1943.

City of Yonkers and John W. Tooley,
Jr., as President of Committee of
Yonkers Commuters, Etc., Appel-
lants,

vs.

The United States of America, Inter-
state Commerce Commission and the
New York Central Railroad Com-
pany.

Appeal from the District
Court of the United
States for the Southern
District of New York.

[January 3, 1944.]

Mr. Justice FRANKFURTER, dissenting.

Congress has empowered the Interstate Commerce Commission to authorize a railroad, when public convenience permits, to abandon any portion of its line. But when such portion is a suburban or interurban electric railway, abandonment may be authorized only if it is part of a general steam railroad system of transportation. Section 1 (18) and (22) of the Interstate Commerce Act, as amended, 49 U. S. C. § 1 (18) and (22). This Court has held that whether such a line is of a character to permit abandonment under federal authority need not be determined in the first instance by the Interstate Commerce Commission; and such determination when made does not foreclose an independent judicial judgment. *Texas & Pac. Ry. v. Gulf, etc. Ry.*, 270 U. S. 266, and *United States v. Gilcho*, 298 U. S. 105. On such an independent examination of the issue the court below had no doubt that the Yonkers branch of the New York Central, the portion of the Central lines for which abandonment was here sought, was not "a suburban or interurban line unconnected with the rest of the Central's railroad system" but was in fact "intertwined with the operation of the [New York Central Railroad] system as a whole". 50 F. Supp. 497, 498. The record amply sustains this conclusion. If this Court, however, on its own estimate of the various elements in the financial, physical

and transportation relations between the rest of the New York Central lines and this Yonkers branch, had struck a contrary balance and found that the Yonkers branch was not operated as a part of the general New York Central system, I should not have deemed the matter of sufficient importance to warrant expression of dissent.

But the Court does not decide on the merits. In effect, it remits the controversy to the Interstate Commerce Commission on the ground that the Commission did not make a formal finding, described as "jurisdictional", that the Yonkers branch was in fact "operated as a part . . . of a general steam railroad system of transportation". The Commission may very well now formally make such a finding of a connection between the Yonkers branch and the New York Central, which in fact is writ large in the Commission's report in granting the application for abandonment, and the weary round of litigation may be repeated to the futile end of having this Court then, forsooth, express an opinion on the merits opposed to that of the Commission and the District Court. This danger if not likelihood of thus marching the king's men up the hill and then marching them down again seems to me a mode of judicial administration to which I cannot yield concurrence. I think the case should be disposed of on the merits by affirming the judgment of the District Court.

This seems to me all the more called for since I find no defect in the foundation of the Commission's order. No doubt the Interstate Commerce Commission like other administrative agencies should keep within legal bounds and courts should keep them there, in so far as Congress has entrusted them with judicial review over administrative acts. Of course when a statute makes indispensable "an express finding", an express finding is imperative, see *Wichita R. R. v. Pub. Util. Comm.*, 260 U. S. 48, 59. But the history of the Interstate Commerce Act and its amendments illumine the different legal functions expressed by the term findings. When Congress exacts from the Commission formal findings there is an end to the matter. For certain duties of the Commission and at certain stages in the history of the Interstate Commerce Act, Congress did require formal findings, but experience led Congress later to dispense with such formal requirements. See *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 489-90. But courts have also spoken of the need of findings as the basis of

validity of an order by the Interstate Commerce Commission in the absence of a Congressional direction for findings. The requirement of findings in such a context is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." See *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 509-511.

• This is the real ground for the decisions which have found Interstate Commerce Commission orders wanting in necessary findings. They have all been cases where the determination of an issue is not open to independent judgment by this Court, and where the case as it came here rested on conflicting inferences of fact left unresolved by the Commission. Such were the circumstances, for instance, in *Florida v. United States*, 282 U. S. 194, particularly at 214-215, and *United States v. B. & O. R. Co.*, 293 U. S. 454, 455, particularly at 463-464. Findings in this sense is a way of describing the duty of the Commission to decide issues actually in controversy before it. Analysis is not furthered by speaking of such findings as "jurisdictional" and not even when—to adapt a famous phrase—jurisdictional is softened by a quasi. "Jurisdiction" competes with "right" as one of the most deceptive of legal pitfalls. The opinions in *Cronell v. Benson*, 285 U. S. 22, and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction.

The nub of the matter regarding the requirement of findings, when the formal making of them is not legislatively commanded, is indicated in *United States v. Louisiana*, 290 U. S. 70. Reviewing the validity of the Commission's order is the serious business of sitting in judgment upon a tribunal of great traditions and large responsibility. An order of the Commission should not be viewed in a hypercritical spirit nor even as though *dequantia juris* were our concern. We should judge a challenged order of the Commission by "the report, read as a whole," 290 U. S. *supra* at 80, and by the record as a whole out of which the report arose.

Viewing its order in this light makes plain enough why the Commission never formally stated that the line which it authorized to be abandoned was in fact operated as part of the New York Cen-

tral system. It never formally made this statement because it was never questioned before it. On the face of the application, in the report proposed by the Commissioner's examiner, and in the report of the Commission, by Division 4, authorizing the issuance of a certificate of abandonment, the facts showing that the Yonkers branch was a part of the operating system of the New York Central are set forth in detail. Extensive exceptions were taken to the examiner's report by the City of Yonkers and a committee of Yonkers commuters but not even remotely did they take the point which is now made the ground for invalidating the Commission's order. Elaborate petitions for rehearing were filed by the protestants, including the Public Service Commission of New York, as the guardian of the local interests of New York,¹ but not one of these petitions raised the objection now raised. The jurisdiction of the Commission was questioned, but no claim was made that the Yonkers branch was not an operating part of the New York Central. The City of Yonkers enumerated four grounds in challenging the jurisdiction of the Commission, but it did not specify the one now taken by the Court. The committee of commuters rested their claim of want of jurisdiction on the specific grounds that "(1) the line sought to be abandoned is an interurban electric passenger railway located wholly within the State of New York and (2) . . . the alleged annual operating deficit" of the Yonkers branch was too insignificant to burden the operation of the New York Central. Exercising the discretion which Congress explicitly conferred upon it, the full Commission denied the petition for rehearing. Interstate Commerce Act, § 17(6). In any fair construction of the action of the Commission such a denial is an adverse finding of such claims as were made in the petitions for rehearing. The crucial fact is that only when the present bill was filed in the court below did the objection which the Court now

¹ Due concern for local interests in the administration of the Interstate Commerce Act hardly calls for an exaggerated concern for formal findings. The Interstate Commerce Act relies primarily on state authorities for the safeguarding of local interests. It is therefore relevant to note that the New York Public Service Commission, which is charged with the duty of protecting the local interests of New York against federal encroachments and which does not appear to have been unalert in doing so, has acquiesced in the decision below and is not here urging the local interest on which the decision of this Court seems to be based. That the state agency had best be looked to for the vindication of conflicting local interests within a state is well illustrated by the fact that while the City of Yonkers protested against the abandonment of the branch line, the City of New York urged it.

sustains emerge in the specific claim that the Yonkers "branch is not operated as a part or parts of a general steam railroad system of transportation."

Can there be any doubt that this contention was not put to the Commission because it was an afterthought? This issue was never tendered to the Commission because the facts which deny it were never questioned in the proceedings conducted before it with vigor and ability by several protestants during the three successive stages that preceded a challenge in the courts.

The case is now sent back to the Commission. The facts regarding the relation of the Yonkers branch to the New York Central are spread at large upon the record and are not in controversy. In view of the three proceedings before the Commission it is reasonable to assume that the Commission will add to its report the formal finding now requested of it. If the case then returns here I find it too hard to believe that this Court would reject the conclusion of the Commission and of the lower court that the Yonkers branch is an operating part of the New York Central within § 1(22). Is not insistence on such an empty formalism a reversion to seventeenth century pleading which required talismanic phrases, as for instance that a seller could not be held to warrant that he sold what he purported to sell unless the buyer pleaded *warrantizanda vendidit* or *bargainizasset*? On the other hand, if the Court with all the facts before it does not think the Yonkers branch is a part of the railway operations of the New York Central, now is the time to say so.

Mr. Justice REED and Mr. Justice JACKSON join in this opinion.